FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

82-1313

No.

In the Supreme Court of the United States

October Term, 1982

IN RE: CATHERINE DOAN
Petitioner

PETITION FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT E. SWEENEY, *Counsel of Record*
THOMAS H. TERRY III
ROBERT P. SWEENEY
1205 Bond Court Building
Cleveland, Ohio 44114-1576
(216) 696-0606
Attorneys for Petitioner,
Catherine Doan

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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No.

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October Term, 1982

IN RE: CATHERINE DOAN
Petitioner

PETITION FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Petitioner, Catherine Doan, moves that an order and rule be entered and issued directing the Honorable Constance Baker Motley, Chief Judge of the United States District Court for the Southern District of New York and the Honorable Burton R. Lifland, Bankruptcy Judge of the United States District of New York to show cause why a writ of mandamus or prohibition should not be issued against them in accordance with the prayer of said petition, and why Petitioner should not have such other and further relief on the premises as may be just and meet.

PARTIES AGAINST WHOM RELIEF IS SOUGHT

Petitioner, Catherine Doan, seeks relief from rules and orders issued by the Honorable Constance Baker Motley, Chief Judge, United States District Court for the Southern District of New York, and the Honorable Burton R. Lifland, Bankruptcy Judge for the Southern District of New York. Relief is not available in any other forum or court due to the nature of the present bankruptcy crisis and the arrogation of jurisdiction by the Respondents, Motley and Lifland, and others similarly situated.

JURISDICTION

Jurisdiction is predicated upon 28 U.S.C. §1651 and Rules 26 and 27 of the Rules of this Court. Issuance of the writ prayed for will be in aid of this Court's appellate jurisdiction by confining respondents and others similarly situated to the exercise of their lawful jurisdiction. *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Will v. United States*, 389 U.S. 90 (1966). The uncertainty regarding the nature of bankruptcy jurisdiction after *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982), ("*Marathon*") and in the absence of congressional action, has created exceptional circumstances which warrant the exercise of this Court's discretionary power so as to determine what, if any residuum of jurisdiction remains with the bankruptcy courts, and what, if any jurisdiction may be extant in the district courts over bankruptcy matters. There is no adequate remedy in any other form or forum due to the scope of the present crises and the unparalleled arrogation of power by the respondents and others similarly situated. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Ex parte Fahey*, 332 U.S. 258 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the following:

United States Constitution, Article III, §§1 and 2;
United States Constitution, Tenth Amendment;
11 U.S.C. §362;
28 U.S.C. §1471(a), (b), and (c);
28 U.S.C. §1478;
28 U.S.C. §1481;
Pub.L. 95-598, Title IV, §401 (1978);

Pub.L. 95-598, Title IV, §404(a) (1978);
Pub.L. 95-598, Title IV, §405 (1978).

Due to the voluminous nature of the material relied upon, it is contained in the Appendix.

STATEMENT OF THE CASE

Petitioner's decedent initiated a personal injury action on February 5, 1980 in the Cuyahoga County, Ohio, Court of Common Pleas, naming fifteen (15) defendants, among them Johns-Manville Sales Corporation, a wholly-owned subsidiary of Manville Corporation (Manville). The complaint was subsequently amended to one for wrongful death.

On August 26, 1982, Manville and its subsidiary companies filed for Chapter XI Reorganization in the Southern District of New York (Appendix "A"). These cases were assigned to Respondent Lifland. Pursuant to 11 U.S.C. §362 Respondent Lifland entered a Restraining Order (Appendix "B"). This order resulted in petitioner's case being stayed as to Manville which was then severed as a party (Appendix "C"). On January 10, 1983, Respondent Lifland reasserted the validity of the stay and Restraining Order apparently under authority of an "Emergency Rule" adopted by Respondent Motley (Appendices "D" and "E")

The judgment of this Court in *Marathon* having become effective December 24, 1982, Petitioner moved Cuyahoga County Common Pleas Court for an order dissolving its stay and setting a date for trial against Manville (Appendix "F"). An order to show cause with temporary restraining order was issued by Respondent Lifland based on authority granted by the Emergency Rule adopted by Respondent Motley in her capacity as Chief Judge of the District Court (Appendix "G").

REASONS FOR GRANTING THE WRIT

I. RESPONDENT LIFLAND'S ACTIONS ARE IN DIRECT CONTRAVENTION OF THE HOLDING OF THIS COURT IN MARATHON

In *Marathon* a majority of this Court consisting of a plurality of four justices with the concurrence of two additional justices, determined 11 U.S.C. §1471(c) to be an unconstitutional grant of jurisdiction because bankruptcy judges are not afforded status under Article III of the Constitution. Further, the majority held that the impermissible grant of jurisdiction to the bankruptcy judges found at 28 U.S.C. §1471(c) was not severable from the remainder of the statute, 28 U.S.C. §1471(a) and (b). There is, therefore, no jurisdiction in *any* court to determine bankruptcy matters.[1]

Respondents, Motley and Lifland, are proceeding as if 28 U.S.C. §1471(a) and (b) were not affected by *Marathon,* and that only so much of 28 U.S.C. §1471(c) as directed bankruptcy courts to exercise §1471(b) jurisdiction was invalidated. This construction conflicts with the plurality of *Marathon* which recognized that the initial jurisdictional grants in §1471(a) and (b) were vested in the bankruptcy court by §1471(c). The Respondents' actions are also violative of the express intent of Congress to give all authority to pass on bankruptcy matters to the bankruptcy court. *See, H.R. Rep.* No. 95-595, 95th Cong., 1st Sess. 14-15 (1977).

The plurality indicated that the gravamen of the constitutional infirmity was the authority granted Article I

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1. Even a narrow reading of *Marathon* indicates that no jurisdiction exists in any court to determine common law claims such as those asserted by Petitioner in the state courts of Ohio.

judges to determine disputes over "private rights" or "rights created by state law." Petitioner seeks to assert her rights as created and defined by the law of the State of Ohio. Respondents would, and have, prevented her assertion of state created rights by enforcement of the stay issued pursuant to 11 U.S.C. §362(a). As such, Respondents have arrogated unto themselves the express power this Court sought to deny them. *In the Matter of the Schear Realty & Investment Co., Inc.*, ... B.C.D. ..... (Bktcy. S.D. Ohio 1982) (Appendix "H").

II. THE EMERGENCY RULE ADOPTED BY RESPONDENT MOTLEY WHICH PERMITS RESPONDENT LIFLAND TO "EXERCISE" JURISDICTION IS UNCONSTITUTIONAL AND VOID

The Emergency Rule adopted by Respondent Motley under which Respondent Lifland is purportedly operating is subject to the same constitutional infirmities found objectionable in §1471(c). The Rule reinstates the same summary-plenary grant found in §1471, and is based on the assumption that bankruptcy jurisdiction reverted to the district courts under §1471(a) and (b).[2]

This position is untenable. The *Marathon* majority stated that all of §1471 was invalid, not just §1471(c). Section 1471(c) stated that bankruptcy courts *shall* exercise all of the jurisdiction granted to the exclusion of the district courts. There is no residual original jurisdiction left in

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2. The Administrative Office of the United States Courts by memorandum of 27 September, 1982 stated:

> *Marathon* does not cause a jurisdictional lapse. The Administrative Office concludes that *Marathon* did not invalidate 11 (sic) U.S.C. Sections 1471(a), (b). In addition, Sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as 'courts of bankruptcy' until 1984.

the district court which would permit Respondent Motley to delegate pursuant to the Emergency Rule. This Court recognized in *Marathon* that §1471 granted no original jurisdiction to the district court:

> In short, the 'adjunct' bankruptcy courts created by the Act exercise jurisdiction behind the *facade* of a grant to the district courts. . . *Marathon, supra* at 2879.

See also: *Schear Realty, supra; In re*: *Macon Uplands Venture*, 2 B.R. 435 (Bktcy. D. Md. 1979); *Anderson v. CBS, Inc., (In re*: *Trac Records*), 9 B.C.D. 1011 (Bktcy. N.D. Ga. 1982).

Respondent Motley cannot rely on §§404 and 405 of the 1978 Act to support the Emergency Rule. Section 404 provides that the courts of bankruptcy, as defined and created under the Bankruptcy Act of 1898, "shall continue through March 31, 1984, to be courts of bankruptcy for the purposes of this Act and the amendments made by this Act." 1978 Act, §404(a), 92 Stat. 2685 (1978). Section 405 of the Act provides that the jurisdiction grant under §241 (28 U.S.C. §1471) "shall apply to the courts of bankruptcy continued by section 404(a) of this Act." 1978 Act, §405(b), 92 Stat. 2685 (1978). During transition, the courts of bankruptcy exercise a jurisdictional grant under §241 of the 1978 Act, not any jurisdictional grant under the Bankruptcy Act of 1898, which was repealed by §401 of the 1978 Act. 1978 Act, §401, 92 Stat. 2685 (1978). *Anderson, supra.*

Respondent Motley cannot rely on 28 U.S.C. §1331 for jurisdiction or to support the Emergency Rule. Federal question jurisdiction was not intended to encompass bankruptcy claims. Every bankruptcy law enacted has had an express jurisdictional grant. *See*: 5 Stat. 446; 14 Stat. 517; 30 Stat. 545, 552; 92 Stat. 2668.

Even if Respondents could rely on §1331 to sustain their exercise of jurisdiction, it could not encompass Petitioner's case, a case based on state common law. The Emergency Rule adopted by Respondent Motley purports to grant Respondent Lifland jurisdiction over civil proceedings "related to cases under Title 11." However, cases arising under Title 11 are not cases arising under the laws of the United States. A case arises under the law that creates the cause of action. *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257 (1916). Proceedings related to cases under Title 11 involve actions which arise under state law, not federal law. *See Chamberlain Livestock Auction, Inc. v. Aberdeen Production Credit Assn.*, 9 B.C.D. 783 (D. S.D. 1982).

Further, the pendent jurisdiction of the district court to consider non-federal claims is no basis for Respondents to assert jurisdiction over proceedings related to cases under Title 11, since pendent jurisdiction exists only where there is a federal claim of sufficient substance. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Accordingly, Respondent Motley does not have the jurisdiction over Petitioner's case as a related proceeding under 28 U.S.C. §1331, which she has attempted to delegate to Respondent Lifland under the Emergency Rule.

28 U.S.C. §1334 is insufficient to support the Emergency Rule and the delegation to Respondent Lifland. The statute conveys summary jurisdiction only. *Freidman v. Snelling*, 526 F.2d 1346 (1st Cir. 1975); *French and Polyclinic Medical School and Health Center, Inc. v. Associated Hosp. S. of N.Y.*, 387 F. Supp. 1359 (S.D. N.Y. 1973). Petitioner's suit does not fall within the summary jurisdiction as it does not involve property within the actual or constructive possession of the debtor but rather a tort suit against the debtor

The Emergency Rule is defective in its assumption that the district court can refer to the bankruptcy court its jurisdiction over civil proceedings "arising in or related to cases. . ." in bankruptcy. This delegation to an Article I court is precisely what this Court held the Congress was unable to do. It is inconceivable that the Respondent Motley can do by Rule that which Congress cannot accomplish by statute.[3] *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981).

III. THE STAY ENTERED AUGUST 26, 1982 BY RESPONDENT LIFLAND IS VOID AND UNENFORCEABLE

Upon filing for Chapter XI Reorganization Manville became the beneficiary of a stay order entered pursuant to 11 U.S.C. §362(a). This stay, renewed by Respondent Lifland by order dated January 10, 1983 is void and unenforceable.

As the plurality in *Marathon* indicated the comprehensive nature of the Bankruptcy Reform Act makes it impossible to invalidate a portion of the bankruptcy court's jurisdiction, while at the same time "leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims. . ." 102 S. Ct. at 2880 n.40. The stay provision is an integral part of that adjudicatory structure designed to protect the jurisdiction of the bankruptcy court. *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U.S. 648 (1935).

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3. 11 U.S.C. §105 is an insufficient basis to enlarge jurisdiction. *Schear Realty, supra.* The mass reference by Respondent Motley does not meet the requirements of Fed. R. Civ. Pro. 53. *See also*: *LaBuy, supra.* The Emergency Rule also fails to meet the criteria of Fed. R. Civ. Pro. 83 in that it conflicts with Rule 53, and in any event does not authorize creation of subsidiary courts. *Miner v. Atlass*, 363 U.S. 641 (1960).

As Respondents have no subject matter jurisdiction to protect and preserve after *Marathon*, the purpose behind the automatic stay and the Restraining Order has been eliminated.

Alternatively, the 11 U.S.C. §362(a) stay is part and parcel of the single congressional design of creating a unified bankruptcy system, *S. Rep.* No. 95-1106, 95th Cong., 2nd Sess. 1 (1978). To the extent that the jurisdictional grant is invalid the stay provisions are likewise invalid. To paraphrase footnote 40 of the plurality: The Courts cannot conclude that if Congress were aware of the absence of bankruptcy courts' jurisdiction over state law cases, it would simply leave the adjudicatory structure of the stay provisions intact as to state law cases.

Respondents enforcing of the stay order is an unconstitutional intrusion upon powers reserved to the states in the Tenth Amendment. Petitioner's suit is a creature of Ohio common law, and as such, falls within the class of cases *Marathon* specifically prevents Respondents from exercising jurisdiction over.

The Tenth Amendment explicitly reserves to the states "the powers not delegated to the United States by the Constitution. . ." Federal courts have repeatedly recognized the exclusive powers granted to the states by the Tenth Amendment, identifying as an important constitutional policy the maintenance of "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may *constitutionally* subtract from their authority." *Parker v. Brown*, 317 U.S. 341, 351 (1943) (emphasis supplied); *see also City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978). Because "the sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of

the keystones upon which our government was founded and is of vital importance to its preservation," Respondents should be "quite properly, loathe to interfere" with that sovereignty. *National Association for the Advancement of Colored People v. Thompson*, 357 F.2d 831, 832-3 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1966).

Respondent Lifland's enforcement and extension of the stay constitutes an exercise of jurisdiction unsupported by statute and therefore void. Respondent Lifland's enforcement and extension of the stay cannot be supported by the Emergency Rule adopted by Respondent Motley as that order is constitutionally infirm. Therefore, the continuing jurisdiction exercised by these Respondents, and others similarly situated, constitutes a usurpation of the legislative power and as such amenable to the writ prayed for. *Will v. United States, supra; DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1944); *McCullough v. Cosgrave*, 309 U.S. 634 (1939).

IV. ADEQUATE RELIEF IS UNAVAILABLE IN ANY OTHER FORM OR FORUM

Writs of mandamus and prohibition, albeit rare, are appropriately issued where, as here, inferior courts are disregarding this Court's mandates and questions of public importance are involved. They afford "an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction or compelling it to exercise its authority when it is its duty to do so." *Ex parte Republic of Peru, supra.*

In the case at bar, Respondent Lifland has made it abundantly clear that he will not recognize any restriction on his power but, rather, will abide by the Emergency Rule adopted by Respondent Motley, which Rule seeks to obviate the effect of *Marathon*. In such circumstances

the exercise by this Court of its discretion to issue extraordinary writs is required to prevent continued injustice. In the context of the Petitioner's case, it is one of thousands of toxic tort cases pending throughout the United States against Manville, all of which, and the respective rights of all of the litigants, are affected by *Marathon* and by the refusal of Respondents to obey this Court's mandate.

Beyond the Petitioner's case is the national chaos created by Congress' failure to enact remedial legislation and this Court's refusal to further stay its mandate in *Marathon*. All bankruptcy courts are operating under a cloud of jurisdictional uncertainty. Debtors and creditors alike are confused and perplexed as to their respective rights, privileges and liabilities. Every order of a bankruptcy court is suspect and the rights of all concerned are in jeopardy. In the Petitioner's case, as a prime example, the authority of the bankruptcy court to enforce the Automatic Stay and Restraining Order is in doubt; the validity of the removal of the asbestos cases to the bankruptcy courts is questionable; and the power of the bankruptcy court or the district court to evaluate the asbestos cases or to approve a reorganization affecting the claims of Manville's creditors, present and future, is uncertain. Only this Court's immediate intervention can provide appropriate sanctuary.

WHEREFORE, Petitioner prays:

1. That a writ of mandamus and prohibition issue from this Court to the Honorable Constance Baker Motley, Chief Judge for the United States District Court for the Southern District of New York and the Honorable Burton R. Lifland, Bankruptcy Judge for the Southern District of New York, to show cause on a day fixed by this Court why mandamus should not issue from this Court directing

them to obey this Court's mandate in *Marathon* and prohibiting them from disregarding said mandate by enforcing or attempting to enforce, under the aegis of the Emergency Rule, the Stay and the Restraining Order entered in Petitioner's case, and which writ should clearly and unequivocally define the scope of any remaining bankruptcy jurisdiction.

2. That Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

ROBERT E. SWEENEY, *Counsel of Record*
THOMAS H. TERRY III
ROBERT P. SWEENEY
1205 Bond Court Building
Cleveland, Ohio 44114-1576
(216) 696-0606
Attorneys for Petitioner, Catherine Doan

APPENDIX

APPENDIX A

Case No. 82 B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Debtor's Petition Under Chapter 11

In re

JOHNS-MANVILLE CORPORATION,
Debtor.

I.D. NO. 13-0889660

1. Petitioner's post-office address is P.O. Box 5108, Denver, Colorado 80217.

2. Petitioner is a New York corporation and has been domiciled in the State of New York for the one hundred eighty days immediately preceding the filing of this petition.

3. Petitioner is qualified to file this petition and is entitled to the benefits of title 11, United States Code as a voluntary debtor.

4. Petitioner intends to file a plan pursuant to chapter 11 of title 11, United States Code.

WHEREFORE, petitioner prays for relief in accordance with chapter 11 of title 11, United States Code.

DAVIS POLK & WARDWELL
Attorneys for Petitioner
By s/ STEPHEN H. CASE
Stephen H. Case, A Partner
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

LEVIN & WEINTRAUB
Attorneys for Petitioner
By: MICHAEL J. CRAMES, P.C., A Partner
By s/ MICHAEL J. CRAMES
Michael J. Crames, President
225 Broadway
New York, New York 10007
(212) 962-3300

I, James F. Beasley, an officer of the corporation named as petitioner in the foregoing petition, certify under penalty of prejury that the foregoing is true and correct, and that the filing of this petition on behalf of the corporation has been authorized.

s/ JAMES F. BEASLEY
James F. Beasley

Executed on this 26th day of August, 1982

APPENDIX B

Case Nos. 82 B 11656 Through 82 B 11676 Inclusive

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization Under Chapter 11.

In re

JOHNS-MANVILLE CORPORATION,
MANVILLE CORPORATION,
MANVILLE BUILDING MATERIALS CORPORATION,
MANVILLE FOREST PRODUCTS CORPORATION,
MANVILLE INTERNATIONAL CORPORATION,
MANVILLE EXPORT CORPORATION,
MANVILLE PRODUCTS CORPORATION,
JOHNS-MANVILLE AMIANTE CANADA INC.,
JOHNS-MANVILLE CANADA INC.,
JOHNS-MANVILLE INTERNATIONAL CORPORATION,
JOHNS-MANVILLE SALES CORPORATION,
MANVILLE INTERNATIONAL CANADA, INC.,
MANVILLE CANADA INC.,
MANVILLE INVESTMENT CORPORATION,
MANVILLE PROPERTIES CORPORATION,
ALLAN-DEANE CORPORATION,
KEN-CARYL RANCH CORPORATION,
MANVILLE IDAHO INC.,
MANVILLE SERVICE CORPORATION,
MANVILLE CANADA SERVICE INC.,
SUNBELT CONTRACTORS, INC.,
Debtors.

RESTRAINING ORDER

Manville Corporation, Johns-Manville Corporation and the debtors hereinabove named (collectively "Manville"), having filed petitions for reorganization under chapter 11, §301 of the Bankruptcy Code and having been continued in the possession and operation of their businesses and property as debtors in possession pursuant to §§1107 and 1108 of the Bankruptcy Code, and

IT APPEARING that this Court, pursuant to 28 U.S.C. §1471(e) has exclusive jurisdiction of all of the property of Manville, wherever located, and that this Court pursuant to §§105, 362 and 366 of the Bankruptcy Code may issue any order, process or judgment including, without limitation, this restraining order, as may be necessary or appropriate to carry out the provisions of chapter 11, and after due deliberation and sufficient cause appearing therefor and no adverse interest being represented, it is

NOW, on motion of LEVIN & WEINTRAUB and DAVIS POLK & WARDWELL, attorneys for Manville,

ORDERED, that all persons (including individuals, partnerships and corporations, and all those acting on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, foreign state, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting on their behalf) be and each of them hereby is stayed, restrained and enjoined from:

1. Commencing or continuing, including the issuance or employment of process, any judicial, administrative or other proceeding against Manville, that

was or could have been commenced before the commencement of Manville's chapter 11 cases, or recovering a claim against Manville that arose before the commencement of the chapter 11 cases;

2. Enforcing, against Manville or against property of Manville, a judgment obtained before the commencement of the chapter 11 cases;

3. Taking any act to obtain possession of property of Manville or of property from Manville;

4. Taking any act to create, perfect or enforce any lien against property of Manville;

5. Taking any act to create, perfect or enforce against property of Manville, any lien to the extent that such lien secures a claim that arose before the commencement of the chapter 11 cases;

6. Taking any act to collect, assess or recover a claim against Manville that arose before the commencement of the chapter 11 cases; and

7. Offsetting any debt owing to Manville which arose before the commencement of the chapter 11 cases against any claim against Manville,

and it is further

ORDERED, that all persons and all governmental units, and all those acting on their behalf, including sheriffs, marshalls, constables and other or similar law enforcement officers and officials, be and each of them hereby is stayed, restrained and enjoined from in any way seizing, attaching, foreclosing upon, levying against or in any other way interfering with any and all of the property of Manville, wherever located, and it is further

ORDERED, that all entities furnishing Manville as of the date of the commencement of the within chapter

11 cases with gas, fuel, telephone services, heat, electrical services, water supply, or any other utility of like kind (collectively the "Utility Companies"), be and each of them hereby is stayed, restrained and enjoined from altering, refusing or discontinuing service to, or from discriminating against, Manville on the basis that a debt owed by Manville to any of such Utility Companies for services rendered prior to the commencement of these chapter 11 cases was not paid when due or on the basis that Manville fails to furnish adequate assurance of future payment in the form of a deposit within twenty (20) days subsequent to the commencement of these chapter 11 cases; and the Court hereby finds that under the circumstances present in the within cases, and particularly in light of Manville's unencumbered asset base, an administrative claim constitutes adequate assurance of future payment in accordance with §366(b) of the Bankruptcy Code, and it is further

ORDERED, that Manville be and it hereby is authorized to expend a sum not exceeding $100,000 in the aggregate to monitor and enforce the automatic stay provisions contained in §362 of the Bankruptcy Code and this Order, including but not limited to making payments to local counsel for such purposes, and it is further

ORDERED, that on request of a party in interest, and after not less than ten (10) days written notice to LEVIN & WEINTRAUB and DAVIS POLK & WARDWELL, attorneys for Manville, and after a hearing, this Court, may consider granting relief from the restraints imposed herein in the event it be necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein, and it is further

ORDERED, that Manville be and it hereby is directed to serve a copy hereof together with notice of entry here-

of upon all known Utility Companies within ten (10) days of the date hereof, and it is further ORDERED, that this Order shall not affect a governmental unit's police or regulatory power or any other exception to the automatic stay contained in §362(b) of the Bankruptcy Code.

Dated: New York, New York
August , 1982

/s/ Burton R. Lifland
United States Bankruptcy Judge

No objection
U.S. Trustee
By: s/Harold Jones

APPENDIX C

Case No. 008534

IN THE COURT OF COMMON PLEAS

State of Ohio)
) SS:
County of Cuyahoga)

CATHERINE DOAN, ETC.,
Plaintiff,

vs.

JOHNS - MANVILLE SALES CORPORATION, *et al.*,
Defendants.

ORDER

James J. McMonagle, J.:

This matter comes before this Court for disposition of pending motions.

1. Trial of this case being scheduled for Monday, September 13, 1982, and Johns-Manville Sales Corporation having filed a petition in New York bankruptcy Court on August 26, 1982, it is hereby ordered that Johns-Manville Sales Corporation is severed as a defendant from these proceedings;
2. Upon consideration of all briefs and arguments submitted, the motion of Defendant Fibre Board Corp. for Summary Judgment is GRANTED:
3. Plaintiff Catherine Doan, etc.'s motion In Limine regarding admission of evidence of decedent's use of alcohol is DENIED.

IT IS SO ORDERED.

/s/ James J. McMonagle
Judge

DATED: 9/13/82

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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82 B 11656 through 82 B 11676

In the Matter

of

JOHNS-MANVILLE CORPORATION, *et al*
Debtor.

(82-6221A)

GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION, and FIBERBOARD CORPORATION, on behalf of themselves and the unofficial committee of Asbestos Case Co-Defendants,
Plaintiffs,

vs.

JOHNS-MANVILLE CORP., *et al,*
Defendants.

DECISION NO. 1 AND ORDER IN RELATED AUTOMATIC STAY PROCEEDINGS

BEFORE: HON. BURTON R. LIFLAND, *U.S. Bankruptcy Judge*

DECISION ON MOTION FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF TO EXTEND THE AUTOMATIC STAY TO ENCOMPASS CO-DEFENDANTS

I. *Background Facts*

Plaintiffs in this declaratory judgment action are inviting this Court pursuant to its equitable powers to broaden the automatic stay afforded the debtor under 11 U.S.C. 362 to include the non-debtor plaintiffs. Essentially, these plaintiffs request by motion for summary judgment that this Court make a ruling which would be the ultimate determination for all courts across the country as to the indispensable nature of Manville in asbestos litigation pending in various state and federal forums.

The plaintiffs are co-defendants of Johns-Manville, Inc. ("Manville") in approximately 11,000 asbestos-related personal injury and property damage suits to which Manville or any of its affiliates is a party. Plaintiffs herein are GAF Corporation, Keene Corporation, Armstrong World Industries, Inc., H.K. Porter Company, Inc., Pittsburgh Corning Corporation, Garlock, Inc., Eagle-Picher Industries, Inc., The Celotex Corporation and Fiberboard Corporation ("the co-defendants").

Manville is a diversified manufacturing, mining and forest products company conducting its business through five principal operating subsidiaries. It is the world's largest miner, processor, manufacturer and supplier of asbestos and asbestos-containing products. Manville's Chapter 11 filing is unprecedented in that it purports to be a healthy company with a substantial net worth. It contends that its financial difficulties have arisen from its position as defendant or co-defendant in the asbestos litigation brought by more than 15,550 plaintiffs throughout the country. Suits are currently pending in 46 states.

Some court systems have more than 2,000 asbestos lawsuits. An average of 425 new asbestos lawsuits per month were brought against Manville pre-petition and it estimates that approximately 32,000 additional suits could be brought against it in the next 27 years.

According to Manville, its current cost for these suits is estimated at approximately $40,000 per case, excluding cases on appeal. Manville has disclosed that since 1981, it has been found liable for punitive damages in several asbestos lawsuits and anticipates additional exemplary damages awards which greatly increase its potential liabilities. According to a study commissioned by Manville, its potential liability in the asbestos litigation will be not less than $2 billion over the next 20 years.

In addition to its litigation with the plaintiffs, Manville is engaged in litigation with its insurance carriers regarding its coverage for the claims asserted against it in the asbestos litigation. *See Johns-Manville Corporation v. The Home Insurance Co.*, No. 765226 (Cal. Sup. Ct., San Francisco County). Manville's insurance carriers have thus far largely disclaimed coverage and refuse to defend or indemnify Manville from its liability in these suits. At issue in the insurance litigation is coverage in excess of $600 million.

II. *Facts Regarding the Instant Proceeding*

On August 26, 1982, Manville filed a petition within the framework of Chapter 11 of the Bankruptcy Code (the "Code"). Pursuant to Section 362(a) of the Code, the filing of the petition triggered an automatic stay of the commencement or continuation of all proceedings against Manville that had been or could have been commenced prior to the bringing of Manville's Chapter 11 petition. On the same date, this Court entered a restraining order substantially identical to the Section 362 stay.

Seeking to broaden the Manville stay so as to include them, the co-defendants assert that such an order is vital for the orderly liquidation of claims against Manville. They point out that courts throughout the country have reached inconsistent results with respect to the effects of the stay on co-defendants. They further contend that they have unliquidated and contingent claims against Manville for contribution or idemnification relating to the asbestos cases. They argue that a stay order applicable to them is necessary to facilitate the equitable administration of the Manville estate and to allow all parties to concentrate on a plan of reorganization rather than to apply their resources to duplicative and protracted litigation. They submit that this Chapter 11 case is so extraordinary and the debtors involvement in the subject litigation is so inextricably bound up with the rights and responsibilities of the co-defendants and the class they represent that this Court must exercise its power pursuant to Section 105 of the Code in the interest of facilitating a comprehensive plan of reorganization which will resolve on a global basis this mammoth problem.

In the alternative, the co-defendants seek an order pursuant to Section 362(a) modifying the automatic stay so as to allow the asbestos cases throughout the country to proceed to the point of judgment, staying only the collection or enforcement of any resulting judgment.

The co-defendants argue that this relief would facilitate the resolution and liquidation of claims, relieve this Court of the burden of trying the many asbestos cases now pending throughout the country[1], allow equitable treatment of all Manville's creditors and avoid duplicative litigation.

The Asbestos Committee, appointed pursuant to an order of this Court and acting as a fiduciary for, *inter alia*,

claimants who have commenced suits for asbestos-related injuries against Manville, has been permitted to intervene as a defendant. Opposing the request to expand the stay to include the co-defendants, the Asbestos Committee also cross-claims seeking to lift the present Section 362 stay so as to allow the suits against Manville to proceed to judgment.

III. *Issues Presented*

The issues presented are: (1) whether this Court should take the unprecedented step of exercising its discretion pursuant to Section 105 of the Code to extend the Section 362 automatic stay so as to encompass the co-defendants herein; and (2) whether, in the alternative, the automatic stay may be lifted to allow all actions against Manville to proceed to judgment.

IV. *Discussion of Law*

Upon examination of the actual wording and legislative history of Sections 362 and 105 and the relevant case law, it is the determination of this court not to extend Manville's Section 362 automatic stay on a global basis so as to prohibit the pursuance of all claims against all co-defendants in every case now pending throughout the country. Rather, the determination of this issue must remain lodged with the court before whom each individual case is pending.

The co-defendants have argued at various times during these proceedings that this court consider their plea that a universal stay will have the effect of creating an atmosphere within the Manville reorganization that could accommodate an industry-wide solution of the entire asbestos health-related problem. They hypothesize a suspension of the enormous litigation nationwide which would facilitate the creation of a superfund or pool to which they,

the insurance industry and Manville would contribute; and, a delivery system to the health claimants. To the extent that the co-defendants purported goal is to join in the creation of an expedient, efficient and fair compensatory delivery system to asbestos victims, their aim is indeed laudable, notwithstanding their self-advancing motivations. The co-defendants assert that extending the stay will shift the focus from asbestos lawsuits and render the asbestos claimants more amenable to cooperate with the debtors and others, including the insurance industry, to achieve a successful reorganization that could include present claimants, as well as future victims who have not as yet manifested symptoms of asbestos-related disease. Indeed, this suspension of the litigation might well serve the purposes urged by the co-defendants.

However, such a pervasive stay, while tempting, is not within this Court's power at this juncture because, as fully discussed *infra*, the scope of Section 362 is narrowly focused on protection of the debtor only. Such a pervasive extension of the stay may not be accomplished by judicial fiat. Thus, I am constrained to declare that so broad an extension of the automatic stay must either be accomplished by legislation or conceivably as part of an eventual reorganization plan.

Moreover, insufficient cause has been shown by the co-defendants to justify lifting the stay to allow all suits to proceed against Manville to judgment.

A. *The Main Relief Sought*

1. *The Scope of Section 362 of the Bankruptcy Code*

Section 362 of the Code provides in part:

> (a) Except as provided in subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title operates as a stay, applicable to all en-

> tities of (1) The commencement or continuation, including issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. §362(a)(1979).

The language of Section 362 clearly refers only to actions against the debtor and does not relate to any other interparty claims. *See Royal Truck & Trailer v. Armadora Maritima Salvadoreana*, 10 B.R. 488, 490 (N.D. Ill. 1981); *In re Related Asbestos Cases*, 23 B.R. 523, 9 B.C.D. 874 (N.D. Cal. 1982). A literal interpretation of this language comports with the rationale behind the formulation of an automatic stay in this statutory scheme as described in *Paden v. Union for Experimenting Colleges and Universities*, 7 B.R. 289 (N.D. Ill. 1980). In *Paden*, the Court stated that the automatic stay is designed:

> to prevent the dissipation or dimunition of the bankrupt's assets during the pendency of the Chapter XI proceeding . . . and to avoid the multiplicity of claims in different forums against the estate. *Id.* at 290 (describing the reasons for the predecessor to Section 362, Rules of Bankruptcy Procedure 11-44 applied to the 1898 Bankruptcy Act).

Furthermore, the legislative history of Section 362 indicates that the automatic stay protects creditors from the injustice of a race for the *debtor's* assets:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the *debtor's* prop-

> erty. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the *debtor's* assets prevents that.

See H. R. Rep. No. 95-595, 95th Cong., 2nd Sess. 340 (1978) (emphasis added).

The legislative history also notes that Section 362 is designed to protect the debtor:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harrassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

See S.Rep. No. 95-989, 95th Cong., 2d Sess. 54-55 (1978).

Notwithstanding this limited focus of Section 362, the co-defendants urge the Court to use its discretionary powers to include them under the penumbra of Section 362's protection. However, although I find their arguments attractive, I do not find their request for such an extension of the automatic stay supportable at law. This holding is formulated against a background of authority denying such relief in bankruptcy cases generally as well as in other courts' decisions in the Manville and United Asbestos and Rubber Co. ("Unarco")[2] bankruptcy cases.

In the oft-cited *Royal Truck* case, 10 B.R. 488 (N.D. Ill. 1981), a suit pending against the debtor for breach of lease was stayed when the debtor filed a Chapter 11

petition. In that suit, a co-defendant, who was the guarantor of a lease of equipment to the debtor, had also been sued by plaintiff and had, in turn, filed a counterclaim against the debtor for indemnification. The plaintiff in that litigation, Royal Truck and Trailer, Inc., requested leave of the bankruptcy court to proceed against the co-defendant. The court granted plaintiff's motion and allowed the suits against the co-defendant to continue. However, in so doing, the Court in *Royal Truck* expressly left the door open for this kind of suit in the future and acknowledged that there are instances where a bankruptcy court may properly stay proceedings against non-bankrupt co-defendants. The Court declared: "Something more than the mere fact that one of the parties to the lawsuits has filed a Chapter 11 bankruptcy petition must be shown in order that proceedings be stayed against non-bankrupt parties." *Id.* at 491.

The co-defendant guarantor in *Royal Truck* had alleged that the debtor's petition operated to stay all proceedings against it. The court rejected this contention because the legislative history of the statute, the well-settled interpretation of the predecessor Act by cases and commentary and the clear language of Section 362 "makes it quite clear that, in Chapter 11, the protections afforded the bankrupt are designed for the debtor-bankrupt only." *Id.* at 490. The court in *Royal Truck* thereby concluded that no convincing justification for extending the stay had been demonstrated in that particular case and therefore maintained the *status quo*.

The court then examined whether the debtor in *Royal Truck* was an indispensable party under Rule 19 of the Federal Rules of Civil Procedure ("FRCP") in whose absence the plaintiff's suit could not proceed. In so doing, the court considered the four interests suggested by Rule

19(b) to be weighed in making its determination whether in equity and good conscience the action should proceed among the parties before it. These interests were: (1) plaintiff's interest in having a forum against co-defendants; (2) the co-defendants' interest in avoiding multiple litigation, inconsistent relief or sole responsibility for a liability it shares with another; (3) the debtor's interest in being adequately represented during the proceedings against the co-defendants; (4) the court and public's interest in complete, consistent and efficient settlement of controversies. *Id.* at 492. (citing *Provident Tradesman Bank v. Patterson*, 390 U.S. 102, 109-10 (1968)).

The only interest which militated against proceeding with the case against co-defendants in *Royal Truck* was the risk of incurring multiple or inconsistent obligations. However, since the co-debtor in *Royal Truck* was a joint obligor and thus primarily liable, it could have been sued as the only defendant. Thus, the co-defendants request to be able to pursue their claim against the debtors in one proceeding was deemed by the court to be desirable, although not essential to a resolution of the action.

The court in *Royal Truck* recognized plaintiff's interest in having a forum, and noted that plaintiff did not necessarily have an alternative forum available to press its claims against the co-debtor. Therefore, the court granted plaintiff's motion to proceed against the co-debtor because it did not perceive a great risk of inconsistent judgments nor an adverse effect upon the debtor by proceeding without it.

The court went on to compare the specificity with which Chapter 13 of the Code was drafted relative to that of Chapter 11. Chapter 13, in contrast to Chapter 11, specifically allows for the stay of an action against a co-debtor:

> Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless (1) such individual became liable on or secured such debt in the ordinary course of such individual's business .... 11 U.S.C. §1301(a).

The implication is clear: Unless specifically called for in the Code, the automatic stay applies only to the debtor.

Other cases are in accord with the result in *Royal Truck*. In *In re Aboussie Brothers Construction Co.*, 8 B.R. 302 (E.D. Mo. 1981), a partnership filed a Chapter 11 petition. The district court affirmed the bankruptcy court's refusal to enjoin the plaintiff from continuing its state court action against the individual partners of the debtor partnership. The adverse effect on the debtor of impairment of the partner's ability to contribute funds to the reorganization was deemed insufficient justification for the issuance of the injunction.

Similarly, in *General Motors Acceptance Corp. v. Yates Motor Co.*, 159 Ga. App. 215, 283 S.E.2d 74 (1981), plaintiff Yates Motor Co. transferred title and possession of three trucks to the debtor in return for a check in the amount of $19,860.19. The debtor's check was dishonored due to insufficient funds. The debtor subsequently transferred the trucks to General Motors Acceptance Corp. ("GMAC"). On January 16, 1980, Yates filed a complaint in Georgia state court against, *inter alia*, the debtor and GMAC alleging conversion. On January 21, 1980, the debtor filed a petition in bankruptcy. On October 15, 1980 a default judgment was entered against GMAC.

On appeal, GMAC contended that the trial court erred in entering the default as the proceedings were stayed against it as a co-defendant of the debtor. The court refused to extend the scope of the stay because the allegations against the debtor and GMAC were not so "inextricably interwoven" that the Section 362 stay applied to GMAC merely because it was a co-defendant of the debtor. *See also In re Casgul*, 22 B.R. 65 (B.A.P. 9th Cir. 1982) (automatic stay applies only for the benefit of the debtor and relief from it cannot be conditioned on forebearance from proceeding against officers or directors of the debtor corporation); *In re The Bank Center Ltd.*, 15 B.R. 64 (Bankr. D. Conn. 1981) (action permitted against general partners of bankrupt partnership to confirm adverse judgment on arbitration award); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr. E.D.N.Y. 1980) (suit against guarantors of a loan who were also co-defendants of the debtor is not stayed); *In re Cloud Nine*, 3 B.R. 202 (Bankr. D.N. Mex. 1980) (creditors permitted to continue state court action against co-debtors).

Courts across the country have been faced with the dilemma of whether to proceed in asbestos litigation in the absence of a co-defendant which has filed for Chapter 11. These courts have reached differing conclusions depending upon the individual facts in each case. Some courts have allowed the actions to continue against co-defendants in the absence of Manville or Unarco. *See, e.g., In re Massachusetts Asbestos Cases*, M.B.L. Nos. 1&2 (D. Mass. Sept. 28, 1982) (the legislative history of section 362 and the case law decided thereunder makes it abundantly clear that the automatic stay operates only against the debtor seeking protection) and *In re Related Asbestos Cases*, 23 B.R. 523, 9 B.C.D. 874 (N.D. Cal. 1982), where the court held that Section 362 does not apply to claims against

non-bankrupt co-defendants. In this California case, Chief Judge Peckham ordered the severance of the claims against Manville and Unarco and allowed the cases against the co-defendants to continue. He held that FRCP Rule 19 is no impediment to the continuation of these suits because joint tortfeasors are not indispensable parties. *See also Lynch v. Johns-Manville Sales Corp.*, 7 C.B.C. 2d 342 (S.D. Ohio 1982) (Section 362(a) does not stay litigation against solvent co-defendants of a Chapter 11 debtor and Unarco and Johns-Manville are neither necessary nor indispensable parties as defined in Rule 19 FRCP because the co-defendants' interest in avoiding multiple litigation did not outweigh plaintiff's interest in having a forum); *In re Asbestos Related Cases*, No. B1-CP-1 (E.D.N.C. September 13, 1982) (The bankruptcy filings of Unarco and Johns-Manville do not automatically stay the suits as to the remaining co-defendants); *Kindle v. Fiberboard Corporation*, No. TY 79-35-CA (E.D. Tex. August 12, 1982), *petition for writ of mandamus denied*, No. 82-2339 (5th Cir. Aug. 20, 1982).

The courts in the above-cited cases have followed the rationale of *Royal Truck* and have relied on the plain language of Section 362(a) which acts as a stay of actions against the debtor only. These courts also note that the legislative history supports this construction and rely on the comparison between the specific statutory provision for extension of the stay to co-debtors in Chapter 13 and the absence of any counterpart to it in Chapter 11. *See, e.g. Kindle, supra; In re Related Asbestos Cases, supra.*[3]

Co-defendants cite two cases to bolster their position that the Section 362(a) stay operates to stay actions against all parties where a co-defendant has filed a bankruptcy petition. These two cases, however, are as inapposite as the asbestos cases cited above. First, co-defendants cite

Federal Life Insurance Co. (Mutual) v. First Financial Group of Texas, Inc., 3 B.R. 375 (S.D. Texas 1980). In *Federal Life*, the district judge refused to permit a plaintiff to sever its claim against a corporate debtor and proceed against the individual co-defendants, one of whom was a corporate officer of the debtor. The court appears to have rested its decision on its broad discretionary powers under FRCP 42(b) to permit or deny severance of actions in light of considerations of justice and efficiency.

It is significant that the ruling in *Federal Life* was made by a trial judge in a non-bankruptcy forum whose decision was based upon the particular facts before him rather than upon general principles. The court in *Federal Life* found that the allegations against the debtor and its officers were "inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding," *Id.* at 376, and "arise from the same factual and legal basis." *Id.* at 377. In contrast, in the instant case no such inextricable intertwining has been proven as to each and every individual case by the co-defendants. This is because the only relationship demonstrated between the co-defendants is that of joint tortfeasors. Each co-defendant is an entirely independent entity, quite unlike each officer of a debtor corporation.[4]

The co-defendants also rely on *In re White Motor Credit Corp.*, 11 B.R. 294 (Bankr. N.D. Ohio 1981), *rev'd on other grounds*, 23 B.R. 276 (N.D. Ohio 1982), in which the bankruptcy court stated:

> All of the products liability suits have been effectively stayed by operation of Section 362 of the Code . . . the stay operates as a windfall benefit to co-defendants and insurance companies who, along with the debtor, enjoy many of the benefits of the moratorium. Never-

> theless, for many reasons (perhaps including section 362 itself), products liability plaintiffs cannot dismiss a reorganization debtor and proceed against co-defendants only. 11 B.R. at 295.

These comments, however, are dicta. The scope of the automatic stay was *not* an issue in *White Motor*. Rather, *White Motor* involved the statutory authority of a bankruptcy judge to appoint a special master. Moreover, the cases relied upon by the bankruptcy judge to support his interpretation of the stay, *Kalb v. Feuerstein*, 308 U.S. 433 (1940) and *Potts v. Potts*, 142 F.2d 883 (6th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945), did not involve the issue of the effect of the stay on co-defendants.

In light of the clear language and legislative history of Section 362(a), the promulgation of a specific provision to stay proceedings against co-defendants of Chapter 13 debtors and case law interpretation, this court holds that Section 362 is limited in scope to the debtor and does not operate to stay actions against the co-defendants of this debtor.

Moreover, it cannot be held that as a matter of law Manville is an indispensable party to the asbestos litigation. Under federal law, joint tortfeasors are not considered indispensable parties. *Field v. Volkswagenwerk A.G.*, 626 F.2d 293, 298 n.7 (3d Cir. 1980); *Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1970); *Windert Watch Co., Inc. v. Pemex Electronics, Ltd.*, 468 F.Supp. 1242, 1246 (S.D.N.Y. 1979), 7 Wright & Miller, *Federal Practice and Procedure* §1623 at 241-42 (1973 & Supp. 1981).

Further, a universal finding that Manville is an indispensable party to all the thousands of cases in which it is currently a defendant is not possible on the facts before the court today. This is because the essential in-

quiry in determining indispensability has been articulated as follows:

> There are two essential tests of an indispensable party:
>
> (1) can relief be afforded the plaintiff without the presence of the other party? (2) can the case be decided on its merits without prejudicing the rights of the other party? *Pickett v. Paine,* 199 S.E. 2d 223 at 230, 230 Ga. 786 (1973).
>
> An indispensable party is one who must be joined because his non-joinder is so prejudicial, both to his rights and to those of the parties already joined, that action cannot continue without him. *Jones Knitting Corp. v. A.M. Pullen & Co.,* 50 F.R.D. 311, 314 (S.D. N.Y. 1970).

Accordingly, the determination of indispensability must be made on a case-by-case basis by the courts across the country where the asbestos litigation is pending. The facts of a particular case may render Manville an indispensable party. For example, if Manville supplied the major portion of asbestos products in a particular location it could be held to be unfair to proceed in Manville's absence. That the indispensability is best determined on a case-by-case basis is illustrated by the divergent results reached by courts in applying a FRCP Rule 19 analysis. It would be most inappropriate for this court, without detailed knowledge of the specific factual contexts, to issue a sweeping ruling on Manville's indispensability. This ruling is properly lodged with each individual trial court. This holding should not be construed to preclude consideration of stay extension to non-debtor parties in a narrower setting where something more than the filing of a bankruptcy petition by a party is shown. *See Royal Truck, supra.*

2. *Scope of Section 105 of the Bankruptcy Code Where No Statutory Basis Exists for the Grant of Stay Relief*

Notwithstanding the limited focus of Section 362, the co-defendants propose that the Court use its powers under Section 105 of the Code so as to provide them with injunctive relief unavailable to them under Section 362. The issue thereby presented is whether the All Writs Statute embodied in Section 105 can be used where no statutory basis exists to grant stay relief. Although Section 105 may be used to extend the stay, Section 105 does not have a life of its own and this extension may only be accomplished within the proper boundaries of Section 362. That is, unless this extension is designed to protect the debtor's interests, it cannot be granted.

Section 105(a) of the Bankruptcy Code provides:

> The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

Section 105 of the Code was not intended to grant the bankruptcy court powers without bounds, *In re Brada Miller Freight Systems, Inc.*, 6 C.B.C. 2d 375, 389 (N.D. Ala. 1981), and the court's equitable powers thereunder are not unrestricted. *In re Dunckle Associates, Inc.*, 6 C.B.C. 2d 600, 605 (Bankr. E.D. Pa. 1982). *See also* 2 Collier on Bankruptcy ¶105.02 at 105-7 (15th ed. 1982). *See also In re Chanticleer Associates, Ltd.*, 592 F.2d 70 (2d Cir. 1979).

The crux of the matter before this Court is whether the injunctive relief sought by the co-defendants under Section 105(a) is "necessary or appropriate" in order to achieve the goals of a Chapter 11 reorganization. *See In re*

Landmark Air Fund II, 19 B.R. 556, 559 (Bankr. N.D. Ohio 1982). A request for an injunction pending confirmation of the debtor's plans, such as the one requested by the co-defendants, is deemed a request for a preliminary injunction. *See In re Larmar Estates, Inc., supra.*

As articulated by the Colliers treatise:

> Bankruptcy Rule 765 generally incorporates Rule 65 of the Federal Rules of Civil Procedure so that it is necessary to comply with Federal Rule 65 when seeking injunctive relief. . . . While the power may be broad under Section 105, the courts should be careful not abuse it. Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules. The bankruptcy courts should exercise great care in this regard. 2 *Collier on Bankruptcy* ¶105.02 (15th ed. 1982).

Therefore, a party seeking the equitable relief of an extension of the stay must satisfy the requirements of FRCP 65 as applied to bankruptcy by Rule 765 of the Rules of Bankruptcy Procedure. The co-defendants here must show that without the sought-after relief, they will suffer irreparable injury and that they are likely to prevail on the merits. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *In re Otero Mills, Inc.*, 21 B.R. 777 at 778-779 (Bankr. D.N.M. 1982). As explained by a leading authority:

> [T]he . . . court may, in the exercise of its discretion, properly grant an interlocutory injunction when it is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued; and that the plaintiff is in substantial need of protection; and that the damage

> to him, if the injunction is denied, *plainly outweighs any foreseeable harm to the defendant.* 7 (Pt. 2) Moore's Federal Practice ¶65.04[1] at 65-39 (2d ed. 1982). (emphasis added).

These requirements, particularly the balance of hardship in favor of the moving party, have been specifically adopted and enforced by the Second Circuit. The court in *Sanders v. Airline Pilots Association, International,* 473 F.2d 244 (2d Cir. 1972), articulated this stringent standard, stating:

> The requirement that a party seeking a preliminary injunction demonstrate that it will suffer irreparable harm in the absence of preliminary relief necessitates more than a mere showing that the party seeking relief will see its relative position deteriorate. Preliminary injunctive relief is extraordinary relief. It requires a convincing demonstration that the balance of hardships tips decidedly toward the moving party. *Id.* at 248.

The co-defendants argue that they will suffer irreparable injury if Section 105(a) of the Code is not employed by this Court to expand the stay afforded the debtor by virtue of Section 362 to encompass co-defendants. It therefore follows, they argue, that because the co-defendants will suffer irreparable injury without the presence of Manville, Manville is an indispensable party to all of the litigation pending throughout the nation.

The co-defendants indicate a number of specific examples of the injuries they claim they will suffer without injunctive relief. First, they allege that there will be a multiplicity of actions resulting in an increased risk of inconsistent verdicts and a great increase in litigation costs to the co-defendants. Second, they claim that the

asbestos lawsuits contain issues of comparative negligence, apportionment among joint tortfeasors, and primary and secondary liability with respect to sellers of asbestos products and suppliers of raw asbestos itself. They argue that without Manville as a party to the litigation, each defendant will not be able fairly to determine its share of liability. Third, the co-defendants contend that their ability to obtain discovery and production of documents from Manville has been severely impaired by Manville's filing. Fourth, they argue that long-established coordinated defense efforts between Manville and the co-defendants will be devastated if the relief sought is not granted. Finally, the co-defendants point out that Manville is currently in litigation with a number of insurance companies regarding questions of insurance coverage of asbestos-related claims. *See e.g., Johns-Manville Corp. v. Home Insurance Company,* No. 765226 (Calif. Sup. Ct., San Francisco County). The co-defendants urge that should it be established that Manville is covered by insurance for some or all of the asbestos claims, then Manville's defense of these cases in the courts in which they arose would be able to go forward without a substantial detrimental effect on property of the estate.

The co-defendants rely upon *In re Otero Mills, Inc.*, 21 B.R. 777, in their attempt to employ Section 105 to enjoin actions not directly covered by Section 362. In *Otero*, the debtor had executed a number of promissory notes which were guaranteed by its president. The holder of the notes brought suit against the president of the corporation to collect on the notes. The debtor argued that irreparable harm would result if the foreclosure were allowed because the property subject to the foreclosure was property which the president planned to sell with the intention that the proceeds be contributed to the debtor

for the payment of corporate debts. The court agreed and extended the stay to encompass the debtor's president.

While it is true that in *Otero* a creditor was stayed from continuing an action against a non-debtor party, the case does not support the ubiquitous relief sought by the co-defendants. *Otero* sets forth the following standards for a court to employ in deciding whether to prohibit the continuance of a suit against a non-debtor party:

> The power to enjoin extends to some cases of a creditor's action against a co-debtor or guarantor, but only in limited circumstances. To so enjoin a creditor's actions against a third party, the court must find that failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party. . . . This power to enjoin assures that a creditor may not do indirectly that which he is forbidden to do directly. Accordingly, 11 U.S.C. §105 permits this Court to enjoin a creditor's action against a third party co-debtor or guarantor when the proper showing is made by the party requesting the injunction. . . . [Therefore, to obtain such a stay] the debtor must show:
>
> 1. Irreparable harm to the bankruptcy estate if the injunction does not issue;
> 2. Strong likelihood of success on the merits; and
> 3. No harm or minimal harm to the other party or parties.

Otero, 21 B.R. at 778-779 (citations omitted).

While these standard were met in *Otero*, it is abundantly clear that the first requirement cannot be met in the instant case. That Manville is basically indifferent to

the co-defendants' requested relief is suggestive of a perception of a lack of irreparable harm to the debtor's estate if the injunction does not issue. Failure to extend the stay herein would not adversely or detrimentally influence or pressure Manville through the co-defendants. This is because the interests of Manville and the co-defendants at the individual trial level are not so interwoven as to create that undue influence. Thus, at least conceptually, a creditor does not impact Manville indirectly by proceeding against the co-defendants.

In addition, the co-defendants have made no showing with regard to the second requirement. Moreover, the third requirement cannot be met. The asbestos victims will certainly suffer by the total frustration of their opportunity for a day in court. As Chief Judge Peckham stated in the context of asbestos litigation:

> Such delay is not costless to these plaintiffs, many of whom are suffering financial hardships and who seek damages to redress their injuries and some of whom are dying and whose testimony must be perpetuated. The defendants may be inconvenienced by expeditious resumption of the actions against them. However, under *Landis*, the balance of hardship weighs in favor of the injured plaintiffs.

In re Related Asbestos Cases, 23 B.R. 523, 531-2 (N.D. Cal. 1982) (citing *Landis v. North American Company*, 299 U.S. 248 (1936). *Accord, Evans v. Johns-Manville Sales Corp.*, C.A. No. 80-2939, slip op. at 4-6 (D.N.J., October 5, 1982).

To the same effect, *see In re Massachusettes Asbestos Cases*, M.B.L. Nos. 1 & 2 (D. Mass. Sept. 28, 1982), in which the court denied a stay against third parties who were co-defendants of a debtor, stating:

> The suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. . . .
>
> Here, it is not a question of a fair possibility. It is certainty that any delay in the continuing efforts to bring these cases to trial will result in continued and increased hardship to the plaintiffs. This is not to ignore the problems of the defendants, but the loss to the plaintiffs far outweighs any possible gain procedural or practical that would inure to them.

Slip Op. at 3.

In another case where a bankruptcy court applied the stringent requirements for injunctive relief in this Circuit, relief was denied. In *In re Larmar, supra,* the bankruptcy court refused to exercise its injunctive powers under Section 105 because the party seeking relief had failed to make the necessary showing of irreparable harm. In *Larmar,* the Federal Deposit Insurance Corporation ("the FDIC") had commenced an action in state court prior to the Chapter 11 filing against the debtor and its guarantors and had obtained summary judgment on this action one day before the filing. Thereafter, the FDIC sought and obtained an order allowing it to enforce its state court judgment against the individual guarantors.

In granting the request to allow the action to go forward against co-defendants, the court articulated the stringent requirements which had not been satisfied by the co-defendants, stating:

> The guarantors have not convinced this court that the balance of hardships tips decidedly toward the party seeking the injunction. *Sanders, supra* at 248.

> In addition, the guarantors have not shown how restraining the FDIC from going after them, is "necessary and [sic] appropriate" to carry out the provisions of Title 11. The guarantors have the burden of showing that the failure to stay the FDIC, would adversely affect the debtors' chances for successful reorganizations: They have failed to meet this burden. Accordingly, the court will not restrain the FDIC from enforcing the state court judgment against the guarantors. *Larmar,* 5 B.R. at 331-332.

Similarly, the co-defendants here have not satisfied their burden to demonstrate that the balance of hardships tips decidedly toward them and that they will suffer irreparable harm if the stay is not extended.

In sum, Section 105 of the Code cannot operate here to expand the scope of Section 362. Because Section 105 can only be used to allow a court to issue all "necessary or appropriate" orders to carry out the provisions of Title 11, it cannot be used to carry out an order in contravention of the narrow focus of Section 362. In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, Section 105 may be used. In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor. In order for these key employees to be covered by the stay, it would have to be shown that they are prevented from carrying out their reorganization duties of plan formulation because of participation in the litigation. Co-defendants have not met their burden of proof in satisfying the injunctive relief standards for extending the stay by means of Section 105 of the Code.[6]

B. *The Alternative Relief Sought*

In the alternative, the co-defendants move this court to lift the automatic stay afforded Manville under Section 362 so as to allow the asbestos victims' lawsuits against Manville to continue to the point of judgment.

Section 362(d) of the Code provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, . . .

The legislative history of Section 362(d) of the Code details what constitutes sufficient "cause" to modify the stay. It provides:

> . . . causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is an executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving post-petition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances. House Report No. 95-595, 95th Cong., 1st Sess. 343-344 (1977).

Based on the evidence before this court, it is clear that just cause does not exist for lifting the automatic stay provision of Section 362 as it applies to Manville. There can be no doubt that the forced participation of a presently uninsured Manville in thousands of lawsuits would represent a tremendous burden on the estate. Because lifting the stay would have the negative effect of vitiating Manville's breathing spell and frustrating Manville's attempts at formulating a reorganization plan, the requested relief would detract from the goals of a Chapter 11 reorganization and must be denied.

It should be noted that in those cases where relief from the automatic stay was granted, the facts were in no way similar to those facts before this Court. More importantly, in these other cases, a denial of the request to lift the stay would have involved duplicative and wasteful relitigation of issues previously decided. The granting of the motion to lift the stay in these cases also represented no significant drain on estate assets.

For example, in *In re McGraw*, 18 B.R. 140 (Bankr. W.D. Wisc. 1982), the court granted relief from the stay of a creditor's single negligence action against the debtor and the debtor's former employer where the creditor agreed to seek enforcement of any judgment award only from the debtor's former employer under the doctrine of *respondeat superior*. The court pointed to the fact that the creditors would have had no remedy if the stay were not lifted and that the only cost to be incurred by the debtor would be the legal fees of a single civil suit. *See also In re Philadelphia Athletic Club*, 9 B.R. 280 (Bankr. E.D. Pa. 1981), where the court allowed a single litigation to proceed in a state court because, among other reasons, the trial had been almost completed.

On the contrary, to grant the relief sought in the instant case will represent an overly burdensome drain on the estate as well as a frustration of the basic intent of Chapter 11 relief. Accordingly, this court denies the alternative relief sought by the co-defendants because they have not met their burden of demonstrating cause for lifting the automatic stay pursuant to Section 362(d).

V. *Conclusion*

Based upon the foregoing, this court, although it recognizes the co-defendants' plight, finds no basis to extend the Section 362 stay to cover them by means of Section 105. In addition, for the reasons set forth hereinabove, this court will not lift or modify the Section 362 stay en masse to allow all suits against the debtor to proceed to judgment.

IT IS SO ORDERED.

Dated: New York, New York
January , 1983

.....

Bankruptcy Judge

FOOTNOTES:

1. In view of the holding of this Court on this motion it is not necessary for purposes of this decision to explore the impact of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. .....; 102 S. Ct. 2858; 9 B.C.D. 67 (1982) on a bankruptcy court's jurisdiction to try the pending asbestos cases. Furthermore, the authority of this Court to determine the automatic stay issues presented herein is set forth in Rule d(3)(A) of Emergency Bankruptcy Rule I adopted by the U.S. District Court for the Southern District of New York, which rule is the local counterpart of a suggested Rule of the Judicial Conference.

2. Unarco is a company similarly situated to Manville in that it also was a defendant in a plethora of asbestos lawsuits prior to filing in Chapter 11 earlier this year. The Unarco bankruptcy case, Case No. 82 B 9841 through 82 B 9851, is currently pending before the Honorable Edward Toles in the Bankruptcy Court of the Northern District of Illinois.

3. It is true, as the co-defendants indicate, that some courts have stayed the actions as to all defendants until further order of the court. For example, in *Brandenburg v. Johns-Manville Sales Corporation, et al,* Civil Action No. 81-1832 (D.D.C. September 14, 1982) (attached to co-defendants Reply Memorandum of Law as Exhibit A), the court was persuaded that the case was to be tried as a whole because under the facts in that particular case, the court found that "the common issues of law and fact, and the considerations herein make it important, if not necessary, to try this case as an entity and that any delay prejudicing plaintiff is outweighed by those considerations." Slip op. at 3.

Also, in *Wedgeworth, et al v. Fiberboard Corp., et al,* IV No. 80-203-B (M.D. La. September 28, 1982) (attached to co-defendant's reply memorandum as Exhibit B), the court stayed the proceedings as to all the parties and refused the plaintiff's request for severance. However, the court did not base its decision on the automatic stay. Rather, it relied on the general discretionary power of a district court to stay proceedings before it in control of its docket and in the interests of justice. *See* slip op. at 5-6 citing *Landis v. North American Co.,* 299 U.S. 248 (1939) and *Mines v. D'Artois,* 531 F.2d 726, 733 (5th Cir. 1976). The *Wedgeworth* court was persuaded to exercise its discretion to stay the proceedings by its finding of the significant possibility of later actions against Johns-Manville and Unarco by plaintiffs as well as crossclaiming co-defendants, which actions would involve a great duplication of efforts. Also, the trial court found it doubtful whether the jury could fairly apportion liability in the absence of Johns-Manville and Unarco. Moreover, in *Wedgeworth,* the trial court found that Johns-Manville had, in fact, taken the lead in the defense of that particular action and that, therefore, its absence would seriously impede the defense efforts of all the co-defendants.

In the instances where trial courts have prohibited suits from going forward without Manville or Unarco, there were either specific trial court findings of indispensability or the stay was ordered separate and apart from Section 362. Accordingly, these asbestos cases cited by the co-defendants do not support the instant application for a broad and blanket extension of the automatic stay to cover all co-defendants in all suits on a global basis.

4. It should be noted that in an unreported decision, the bankruptcy court subsequently lifted the stay as to co-defendants and the district court thereafter proceeded with the litigation.

5. The district court subsequently vacated the bankruptcy court's order appointing a special master without commenting on the bankruptcy courts dicta regarding the scope of the automatic stay. *See In re White Motor Corp.,* 7 C.B.C. 2d 362 (N.D. Ohio 1982). Most recently, the Sixth Circuit has stayed the

district court ruling and reinstated the bankruptcy court's order appointing a special master also without commenting on the dicta regarding the scope of the automatic stay. *See In re White Motor Credit Corp.*, No. 82-3638, Order by the Sixth Circuit dated November 15, 1982.

6. The denial of the co-defendants' principal prayer for relief is intended to govern the outcome in two Manville actions brought individually and separate and apart from the instant matter to determine the extent of the stay with regard to co-defendants.

One of these actions is brought by several Ohio plaintiff creditors by and through their attorney, Robert E. Branham, regarding the following pending actions:

Bowman, et al v. Armstrong World Industries, et al, C-2-81-1492;

Mary E. Braumann, et al v. Armstrong World Industries, et al, C-2-82-312;

Ronald L. Tatman, et al v. Armstrong World Industries, et al, C-2-82-359;

David Frank Young, et al v. Ottawa Silica, et al, C-2-82-523;

Bernice Benadum v. Armstrong World Industries, et al, 82-DV-03-1779

Pursuant to this Court's decision herein, these Ohio plaintiffs may proceed against the above-enumerated non-debtor co-defendants.

The other case, *Zenzen v. Johns-Manville, Adversary Proceeding No. 82-6420A*, relates to an action entitled *"Mr. and Mrs. David Zenzen, Individually, a/n/f of Ryan Zenzen and Robin Zenzen, Minors v. Today Housing, et al"*, 81-09928 currently pending in Harris County, Texas. The *Zenzen* family seeks an order from this court that will permit the continuation and completion of a state court trial against all defendants except Manville Forest Products Corp., which corporation plaintiffs never sued directly. Manville Forest Products Corp. is a third party defendant in this state court action.

At a hearing held on December 16, 1982, this Court ruled that the Zenzen family cannot proceed against Manville. As to whether the Zenzens may proceed against all other co-defendants, this Court reserved decision pending the outcome in the instant proceeding.

Pursuant to my decision herein, it is hereby ordered that the Zenzens may proceed against all defendants except Manville Forest Products Company in the state court action currently pending in Harris County, Texas.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RULE

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short distance.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United

States Bankruptcy Court in this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the Court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy Judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estates; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn

over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge of any notice of appeal of application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S.Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.*

APPENDIX F

Case No. 80-008534

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CATHERINE DOAN, *etc.*
Plaintiff

vs.

JOHNS-MANVILLE SALES CORP., *et al.*
Defendants

Judge James McMonagle

MOTION TO ADVANCE CAUSE ON COURT'S FILE AGAINST DEFENDANT, JOHNS-MANVILLE SALES CORPORATION

Now comes the plaintiff by and through her counsel and respectfully requests that this Court advance this cause of action, as against defendant, Johns-Manville Sales Corporation (herein referred to as "Johns-Manville") so as to place this cause upon the Court's trial docket for adjudication at the earliest possible time.

Respectfully submitted,

/s/ ROBERT E. SWEENEY
ROBERT E. SWEENEY CO., L.P.A.
1205 Bond Court Building
Cleveland, Ohio 44114-1576
(216) 696-0606
Attorneys for Plaintiff

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Previously, this Court had entered an order severing Johns-Manville from this cause for the purposes of a trial that went forward beginning on September 13, 1982. The Court took this action in light of an automatic stay against the court proceedings or litigations involving Johns-Manville Sales Corporation, which automatic stay arose pursuant to Chapter 11 U.S.C. §362 of the Bankruptcy Reform Act of 1978, which code section became applicable in light of the fact that the Manville Corporation filed for corporate reorganization under the protection of the Bankruptcy Act on the 26th day of August, 1982.

Of course, at the time of the filing of the Manville petition for reorganization, the United States Supreme Court had already announced its opinion in a case entitled *Northern Pipe Line Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982). In that opinion the Supreme Court held that that range of jurisdiction to federal bankruptcy courts as established under the new 1978 Bankruptcy Reform Act was constitutionally defective, in that it was an impermissible attempt on the part of Congress to vest Article III judicial power in a legislative Article I court. This opinion of the Supreme Court was issued on June 28, 1982, but by its own terms was stayed in its effect until October 4, 1982. Subsequently, this stay was extended until December 24, 1982. The purpose of the stay was to grant Congress additional time to legislate or correct the constitutional defect in the act as announced in *Northern Pipe Line, supra.* The purpose of this memorandum is to consider the impact on *Northern Pipe Line* upon the federal bankruptcy system established by the Reform Act of 1978 and further, and

more specifically, to consider its impact upon the defendant in this lawsuit, the Johns-Manville Sales Corporation. This consideration will begin with a brief review of constitutional limits placed upon inferior courts of the federal judicial system.

II. FEDERAL COURTS ARE COURTS OF LIMITED RATHER THAN GENERAL JURISDICTION AND ARE THEREFORE, EMPOWERED TO HEAR ONLY SUCH CAUSES AS ARE WITHIN THE JUDICIAL POWER OF THE UNITED STATES AS DEFINED IN THE CONSTITUTION AND AS HAVE BEEN ENTRUSTED TO THEM BY A JURISDICTIONAL GRANT PASSED BY CONGRESS

It is a principle of first importance that the only federal court which is called for and established by the Constitution itself, without further need of enabling legislation from the Congress, is the United States Supreme Court. Article III, Section 1 of the Constitution provides that:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Article I, Section 8 specifically grants the Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States". Reviewing these two sections together, it seems clear that although Congress has the authority to pass uniform laws governing bankruptcy, no federal district court would have jurisdiction over such matters unless a specific grant of such jurisdiction was also made by Congress. It is specifically for the reason that no such congressionally approved grant of jurisdiction over bankruptcies now exists vesting such jurisdiction in

the federal district courts of our federal judicial system that plaintiff now urges this Court to proceed to trial against defendant, Johns-Manville. The subject matter jurisdiction of the federal district courts over bankruptcies filed after October 1, 1980 is contained in §241 of the Bankruptcy Reform Act of 1978, 28 U.S.C. §1471. This was the very section of the Bankruptcy Reform Act reviewed by the Supreme Court in its consideration of *Northern Pipe Line, supra.*[1]

In *Northern Pipe Line*, the case had developed procedurally after the appellant, Northern Pipe Line Construction Company, had filed for reorganization under the Bankruptcy Reform Act of 1978. After the petition was filed, Northern Pipe Line filed in the Bankruptcy Court a suit against the Marathon Pipe Line Company seeking damages for alleged breach of contract. After initiation of this proceeding, Marathon sought dismissal of the suit on the grounds that it was unconstitutional for this contract action to be litigated in the Bankruptcy Court, since the grant of jurisdiction under the Bankruptcy Reform Act vested all aspects of federal judicial power in an adjunct court administered by judges not having lifetime tenure or guarantees against diminishment of salary, and as such this grant of jurisdiction violated Article III of the Constitution.

The Supreme Court upheld the position of Marathon, and in the opinion written by Justice Brennan stated as follows:

---

1. The only possible grant of jurisdiction over bankruptcies to the federal district courts must be found in §241 of the Bankruptcy Reform Act in 1978, inasmuch as the Bankruptcy Reform Act itself did repeal all previous grants of jurisdiction over bankruptcy in the federal court system. *In re: Parr*, 3 BR 691 (D.C. N.Y.); *In re: Ambrose*, 4 BR 395 (Bktcy Ohio); and 8 CJS *Bankruptcy* §8.

> We conclude that §241(a) of the Bankruptcy Act in 1978 has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Article III district court, and has vested those attributes in a non-Article III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjunct to Article III courts.

It is not necessary for the purposes of the issue now before this Court to examine the court's reasoning which ultimately lead them to the conclusion that the adjunct system of bankruptcy courts as established by §241 of the Act impermissibly vested Article III functions and powers in an Article I legislative court. The fact of the matter is that a least with respect to the type of case presented to the court in *Northern Pipe Line,* (i.e., a traditional state common law action only peripherally related to the adjudication of bankruptcy under federal law), such grant of jurisdiction was unconstitutional. The issue that remains as an imperative inquiry is to what extent that defect in the jurisdictional grant of the act deprives federal courts of subject matter jurisdiction over bankruptcy cases. Or to state the issue in a different manner, can the defect be severed, so as to preserve residual grant of jurisdiction over causes of action not considered in *Northern Pipe Line.*

A reading of the *Northern Pipe Line* opinion makes it clear that six of the nine justices of the court considered this issue and came to the conclusion that the constitutional defect was not severable. In footnote 40 of the court's opinion, as announced by Justice Brennan, and as joined in by Justices Marshall, Blackman, and Stevens, the court stated as follows:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state law contract claim against Marathon.

> As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Article III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Article III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to insure adjudication of all claims on a single forum and to avoid the delay and expense of jurisdictional disputes. See *H.R. Rep.* No. 95-595, *supra*, page 43-48; *S. Rep.* No. 95-989, page 17 (1978). Nor can we assume as the Chief Justice suggests, *post*, at 2, that Congress' choice would be to have this case routed to the United States District Court of which the bankruptcy court is adjunct. We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Article III, in the way that will best effectuate the legislative purpose.

A concurring opinion was written by Justice Renquist and joined in by Justice O'Connor. In Justice Renquist's concurring opinion, he stated as follows:

> I would, therefore, hold so much of the Bankruptcy Act in 1978 as enables the bankruptcy court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Article III of the United States Constitution. Because I agree with the pleu-

rality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under §241(a), see ante at 37 note 40, I concur on the judgment.

In reviewing the opinion of the pleurality, together with the concurring opinion of Renquist, it is clear then that the court's holding goes further than merely finding that §241(a) of the Bankruptcy Reform Act of 1978 is unconstitutional in that it vests an Article I court with jurisdiction over a state law claim. A majority of the justices have decided that this defect is indeed not severable from the jurisdictional grant, and that therefore, congressional action is necessary to reform §241 and bring it into compliance with Article III requirements. In light of this finding that the defect is not severable, no constitutionally valid grant of jurisdiction now exists vesting any jurisdiction over bankruptcy matters in any federal court, be it the bankruptcy court, or the federal district court.

III. ABSENT AN EFFECTIVE GRANT OF JURISDICTION OVER BANKRUPTCY MATTERS TO ANY INFERIOR COURT OF THE FEDERAL JUDICIAL SYSTEM, ALL PROCEDURAL AND SUBSTANTIVE ASPECTS OF THE BANKRUPTCY REFORM ACT OF 1978 CONFERRING ANY RIGHTS UPON PETITIONERS FILING FOR CORPORATE REORGANIZATION OR BANKRUPTCY RELIEF ARE MOOT AND THEREFORE, DO NOT FORESTALL THIS COURT TO EXERCISE ITS JURISDICTION TO LITIGATE THE LIABILITY OF JOHNS-MANVILLE SALES CORPORATION IN THE INSTANT CAUSE

As part of the legislative scheme incorporated within the Bankruptcy Reform Act of 1978, there was contained

a section authorizing an automatic stay applicable to all entities, preventing the commencement or continuation of any judicial proceeding against a debtor that could have been or was commenced before the filing of that petition for relief under Title 11 U.S.C. §362(a). This automatic stay provision had the purpose of preserving the status quo after the filing of a petition for reorganization so as to provide for an adequate protection of the assets of the petitioner until such time as a plan of reorganization could be formulated and take effect. *In re: BBT,* 11 BR 224 (Bktcy Nevada 1981). This provision of the act is considered one of the fundamental protections afforded a debtor under Title 11, and confers to him a procedural and substantive remedy which clearly has not been ruled unconstitutional in *Northern Pipe Line, supra.* Nevertheless, since *Northern Pipe Line* does withdraw all jurisdiction over bankruptcy from the federal judicial system, those procedural rights or remedies granted under 11 U.S.C. §362 are moot, and any infringement upon such rights may be viewed as damage without remedy.

There is historical precedence for such a situation where federal jurisdiction has been withdrawn over a particular subject matter, to the detriment of a party's substantive or procedural rights. In the landmark case of *Ex parte McCardle,* 7 Wall 506 19 L. Ed. 264 (U.S. 1869), the petitioner had been charged with the publication of articles alleged to have been incendiary and libelous in a newspaper of which he was the editor. He had been held in the custody of military authority for trial before a military commission on these charges. The custody was alleged to be authorized by certain acts of Congress, adopted during the period of reconstruction. The petitioner had applied to the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus, basing his applica-

tion on an act of Congress authorizing the grant of such writ "in all phases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty of the law of the United States."

The petition was denied by the Circuit Court, and afterwards the petitioner was remanded to military custody. He took an appeal as authorized by congressional act, to the Supreme Court. After the case had been argued but before decision was announced, Congress passed an act repealing its previous grant to the Supreme Court to hear appeals such as that presented by the petitioner. The Supreme Court then considered the impact of this congressional repeal of its jurisdiction over such matters. The Court held as follows:

> What, then is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact in dismissing the cause. And this is not less clear upon authorities and upon principle. . .

A clear example of the impact of withdrawal of jurisdiction over substantive rights would be that of the passage of the Norris-LaGuardi Act of March 23, 1932, 29 U.S.C. §101-115, which narrowly restricted the authority of courts of the United States to issue restraining orders or temporary and permanent injunctions in "a case involving or growing out of a labor dispute" providing that "yellow-dog" contracts "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court". The Act throughout, was in fact, drawn as a limitation upon the jurisdiction of federal courts.

The effect of this withdrawal of jurisdiction was to limit an employer's remedy to protect property interests which were protected by due process. Such interests, for example, might encompass his right to condition employment by an employee's promise not to join a labor union. Such a right has been very strenuously and effectively protected, previous to the passage of the Norris-LaGuardi Act, by resort to injunctive relief issued by the federal courts by way of restraining orders. *See Truax v. Corrigan*, 57 U.S. 12 (1921) and *Coppage v. Kansas*, 36 U.S. 1 (1915); and *Adair v. United States*, 208 U.S. 161 (1908). In spite of these due process protections which had previously been extended to the employers' property interests, the Supreme Court, in *Lauf v. E. G. Shinner & Company*, 303 U.S. 323 (1938) found that the withdrawal of federal jurisdiction over these matters even though it would withdraw due process protection of substantive rights, was not unconstitutional. In the words of the court:

> There can be no question of the power of Congress vested to define and limit the jurisdiction of the inferior courts of the United States.

In other words, Norris-LaGuardi, as interpreted by the courts effectively rendered the due process arguments of the employers to be irrelevant, inasmuch as it withdrew jurisdiction from the federal judicial system to even consider them. *Senate Report*, No. 163, H.R. Rep. No. 669, 72nd Congress, First Session 10 (1932); *Frankford & Green*, "The Labor Injunction", 210-11 (1930).

Plaintiff can conceive of no material distinction between a situation where Congress has effectively withdrawn jurisdiction from the federal system as opposed to that situation where Congress has defectively attempted to confer jurisdiction. In either case, jurisdiction does not exist and the fact that substantive or procedural rights

and remedies might survive this constitutional defect is irrelevant, inasmuch as without a procedural or adjudicative system having jurisdiction over such remedies and rights, such remedies and rights become moot and are meaningless.

Under these circumstances, 11 U.S.C. §362(a), the automatic stay provision of Bankruptcy Reform Act of 1978 is therefore, moot and cannot act as a barrier to this Court's exercise of general jurisdiction over the Johns-Manville Sales Corporation.

IV. THE ATTEMPT BY UNITED STATES DISTRICT COURTS MEETING IN EXECUTIVE SESSION TO ADOPT EMERGENCY RULES GOVERNING THEIR JURISDICTION OVER BANKRUPTCY MATTERS EXCEEDS THEIR RULE MAKING POWERS AND IS IN DIRECT CONTRADICTION TO THE SUPREME COURT'S DECISION IN NORTHERN PIPE LINE, SUPRA

In anticipation that Congress might not reform the Bankruptcy Act before the Supreme Court's decision in *Northern Pipe Line* became effective, the United States Judicial Conference, headed by Chief Justice Warren Burger, put forth proposed rules aimed at clarifying jurisdictional limits of bankruptcy judges and bringing that jurisdiction into compliance with the requirements of Article III of the United States Constitution. These rules have been adopted by the judicial councils of nearly every federal circuit court and most federal district courts as of December 24, 1982. A copy has been attached hereto and labeled Exhibit "A".* These rules are defective, in the first instance, since the courts are limited in their adoption of local rules to the extent that they are not authorized to adopt local rules "inconsistent" with existing

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*Reproduced here as Appendix E.

rules and the Bankruptcy Code. Obviously, until the Bankruptcy Code is reformed by an act of Congress, the rules adapted by the judicial councils are inconsistent with the existing Bankruptcy Code.

More importantly though, the rules attempt to preserve the Act in a manner which even the Supreme Court rejected in its consideration of the *Northern Pipe Line* litigation. As was pointed out earlier, in footnote 40 of the pleurality decision, six of the nine justices considered that the defect of jurisdictional grant could not be severed, and that the jurisdictional grant in total could only be remedied by an act of Congress. As the court specifically pointed out, any other approach would invite jurisdictional challenge in every advisary proceeding, and the limits of jurisdiction would have to be litigated on a case by case basis, which would be inconsistent with the basic purpose of the Act.

Essentially what the rules represent are an attempt by the United States Judicial Conference to circumvent the extent of the *Northern Pipe Line* decision and adopt those recommendations set out by the Chief Justice in his dissenting opinion to that decision. It is respectfully submitted by counsel for plaintiff that it is not within the power of the United States Judicial Conference, or any judicial council of a federal district court to effectively circumvent the holding of the majority of the justices who concurred in the opinion in *Northern Pipe Line* and specifically rejected any possibility that they might, by judicial rule or pronouncement sever the constitutional defect found in §241(a) of the Bankruptcy Reform Act. Those justices having deferred to the legislative prerogatives and powers of Congress, it does not seem appropriate that inferior federal tribunals might disregard this policy decision.

As additional support to plaintiff's position, we would draw the Court's attention to the Supreme Court's decision in *Sheldon v. Sill*, 8 Howard. 440, 12 L. Ed. 1147 (U.S., 1850). In that case the petitioner, a resident of the state of New York sued the defendant, a resident of the state of Michigan in a federal circuit court, basing his claim of jurisdiction on diversity, as called for by the Constitution. However, the plaintiff's cause of action was for recovery of a debt secured by a mortgage bond, which debt had been assigned to the plaintiff by the original holder, a resident of the state of Michigan. The defendant answered by arguing that there was a lack of jurisdiction in the federal court in that the Judiciary Act of 1789 specifically stated that in an action for a recovery of a promissory note the federal court has no jurisdiction if the original holder of the note could not have established diversity. The circuit court upheld the argument of the defendant and ruled that it was without jurisdiction. It reached this decision even though it acknowledged that Article III Section 2 of the Constitution defined the scope of federal judicial power so as to include jurisdiction over controversies between citizens of different states. It was the decision of the court that since inferior tribunals of the federal court system are established by congressional act, it is within the congressional prerogative not to confer all of federal jurisdiction upon the courts so established, as Congress may so desire. The ruling of the court was stated as follows:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, either that each inferior court

created by Congress must exercise all the judicial powers not given the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow also, that, having a right to prescribe, Congress may withhold from any court of its creation, jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but is not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this Court since its first establishment. To enumerate all the cases in which it has been either directly advanced or passively assumed would be tedious and unnecessary.

It is therefore the position of the plaintiff that the interim rules as adopted by the United States District Court for the Southern District of New York did not preserve for that federal court or for its adjunct bankruptcy court any jurisdiction over bankruptcy or any cause of action arising under or attended to bankruptcy. Only an act of Congress could accomplish such a result.

For all of the foregoing reasons, plaintiff respectfully asks this Court to grant this motion and proceed to trial at the earliest possible date in the instant cause.

Respectfully submitted,

/s/ ROBERT E. SWEENEY
ROBERT E. SWEENEY Co., L.P.A.
1205 Bond Court Building
Cleveland, Ohio 44114-157
(216) 696-0606
Attorneys for Plaintiff

EXHIBIT "A"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

GENERAL ORDER

By direction of the full Court met in Executive Session on Thursday, 16 December 1982, the following is adopted as a Rule of this Court:

A. RESOLUTION

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankrupcty cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathone Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1)

the unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

B. FILING OF BANKRUPTCY PAPERS

The Court of Bankruptcy constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

C. REFERENCE TO BANKRUPTCY JUDGES

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy

judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

D. POWERS OF BANKRUPTCY JUDGES

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(a) a proceeding to enjoin a court;

(b) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(c) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(d) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (D)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (a) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims

brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(b) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

E. DISTRICT COURT REVIEW

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (E) (2) (a) and (b) of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and

the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (a) A district judge shall review:

(i) an order or judgment entered under paragraph (D) (2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (D) (2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (D) (3), whether or not any notice of appeal or application for leave to appeal has been filed.

(b) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (E) (2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

F. LOCAL RULES

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

G. BANKRUPTCY RULES AND TITLE IV OF PUBLIC LAW 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ... U.S. ....., 102 S. Ct. 2858 (1982).

H. EFFECTIVE DATE AND PENDING CASES

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

ENTER:

FOR THE COURT
/s/ (Illegible)
Chief Judge

Dated at Chicago, Illinois, this 20th day of December 1982.

APPENDIX G

Case Nos. 82B11656 through 82B11676 (BRL)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization Under Chapter 11

In re JOHNS-MANVILLE CORPORATION, *et al.*,
Debtors,

JOHNS-MANVILLE SALES CORPORATION, *et al.*,
Movants,

-against-

CATHERINE DOAN, ROBERT E. SWEENEY and
ROBERT E. SWEENEY CO., L.P.A.,
Respondents.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER

[CONFORMED]

Upon the annexed application of Movants Johns-Manville Sales Corporation, *et al.* (collectively "Manville"), and the exhibits attached thereto and the annexed affidavit of Miriam G. Cedarbaum filed herewith by Manville seeking a temporary restraining order against the Respondents pursuant to Sections 362 and 105 of the Bankruptcy Code and Rule 765 of the Rules of Bankruptcy Procedure and Emergency Bankruptcy Rule I, Rule (d) (3) (A) of the United States District Court of the Southern District of New York relating to automatic stay litigation and this

court's decision No. 1 and order in related automatic stay proceedings of Jan. 10, 1983.

IT APPEARING that Catherine Doan, Robert E. Sweeney and Robert E. Sweeney Co., L.P.A., are improperly continuing a judicial proceeding against Manville that was commenced before the filing by Manville of petitions for reorganization under Chapter 11, §301 of the Bankruptcy Reform Act of 1978, as amended (the "Code") on August 26, 1982,

NOW, on motion of DAVIS POLK & WARDWELL and LEVIN & WEINTRAUB & CRAMES, attorneys for Manville, it is

ORDERED, that Catherine Doan and her attorneys Robert E. Sweeney and Robert E. Sweeney Co. L.P.A., individually (collectively the "Respondents"), show cause before the Honorable Burton R. Lifland, United States Bankruptcy Judge, at the United States Courthouse, Room 237, Foley Square, New York, New York on the 24th day of January, 1983 at 11 am in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made and entered:

(a) Decreeing and adjudging Respondents to have violated and to be in continuing violation of the Automatic Stay provision of Section 362 of the Code and this Court's Restraining Order, entered August 26, 1982;

(b) Decreeing and adjudging Respondents to be in civil contempt of this Court and imposing a fine by reason of their violation and continuing violation of the Automatic Stay provision of Section 362 of the Code and this Court's Restraining Order entered August 26, 1982;

(c) Until upon application to and order of this Court, permanently restraining, staying and enjoining Respondents from taking any action in support of their motion to advance the cause of action against Manville in the case of *Doan v. Johns-Manville Sales Corp., et al.*, Case No. 80-008534 currently pending in the Court of Common Pleas of Cuyahoga County, Ohio and permanently restraining, staying and enjoining Respondents from taking any other action in violation or derogation of Section 362 of the Code and this Court's Restraining Order entered August 26, 1982 and from taking any other action that would in any respect alter the status of Manville as of December 24, 1982 in the *Doan* case or any other asbestos related case;

(d) Directing Respondents individually and collectively to withdraw their motion filed January 14, 1983 to advance the *Doan* action against Manville in the Court of Common Pleas of Cuyahoga County;

(e) Granting Manville such other and further relief as is just and proper;

and it is further

ORDERED, that pending the hearing and determination of this matter, the Respondents individually and collectively are directed forthwith to temporarily withdraw their motion to advance the cause of action against Manville in the case of *Doan v. Johns-Manville Sales Corp., et al.*, No. 80-008534 currently pending in the Court of Common Pleas of Cuyahoga County and are, temporarily restrained from taking any action in support of their motion and from taking any other action in violation or derogation of Section 362 of the Bankruptcy Code and this

Court's Restraining Order entered August 26, 1982 and from taking any other action that would alter in any respect the status of Manville in the *Doan* case or any other asbestos related case as of December 24, 1982; and it is further

ORDERED, that telephonic notice of the terms of this order by January 18, 1983 to and service by hand delivery upon Robert E. Sweeney Co., L.P.A., by the close of business on January 19, 1983 shall be deemed good and sufficient service and notice of the relief requested herein.

Dated: New York, New York
January 18, 1983
At 4:45 p.m.

/s/ BURTON R. LIFLAND
United States Bankruptcy Judge

AFFIDAVIT IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

[CONFORMED]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MIRIAM G. CEDARBAUM, being duly sworn, says:

1. I am a member of the Bar of this Court and an associate of the firm of Davis Polk & Wardwell, attorneys for Johns-Manville Sales Corporation, *et al.* (collectively "Manville"). I make this affidavit in support of Manville's application for a temporary restraining order, directing Respondents to withdraw their motion to advance the cause of action against Manville in the case of *Doan v.*

Johns-Manville Sales Corp., et al., No. 80-00534 currently pending in the Court of Common Pleas of Cuyahoga County, enjoining the Respondents from taking any action in support of their pending motion against Manville and from taking any other action in violation or derogation of Section 362 of the Bankruptcy Code and this Court's outstanding Restraining Order entered August 26, 1982 and from taking any other action that would alter in any respect the status of Manville as of December 24, 1982 in the *Doan* case or any other asbestos related case.

2. I have reviewed the Application of Manville herein. All of the facts set forth in the Application are true to the best of my knowledge, information and belief.

3. On Tuesday, January 18, 1983 at approximately 3:45 p.m., I spoke with or caused others to speak with the following person, giving telephonic notice of the within application;

(1) STEVE FOLEY, of Robert E. Sweeney Co.

/s/ MIRIAM G. CEDARBAUM
Miriam G. Cedarbaum

Sworn to before me this ..... day of January, 1983.

/s/ MARGARET M. FEE
Notary

APPENDIX H

In Chapter 11 Proceedings
Case No. 3-82-01843
Adv. No. 3-82-0491

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF

THE SCHEAR REALTY & INVESTMENT CO. INC.

DEBTOR

JUDGMENT ENTRY ON MOTION TO REMAND

In accordance with the Supplemental Decision and Order entered this date, ORDERED, ADJUDGED AND DECREED that the foreclosure suit filed by The Winters National Bank and Trust Company of Dayton vs. Schear Group, Inc. et al. in the Common Pleas Court of Montgomery County, under Case No. 82-1820 is remanded for disposition in the state court.

IT IS SO ORDERED.

Dated: December 27, 1982

/s/ Anderson
Bankruptcy Judge

CASE NO. 3-82-01843

IN CHAPTER 11 PROCEEDINGS

IN THE MATTER OF

THE SCHEAR REALTY & INVESTMENT CO., INC.
DEBTOR

SUPPLEMENTAL DECISION AND ORDER

FINDINGS OF FACT

This matter is before the Court as one of innumerable other cases wherein jurisdiction has been exercised pursuant and conformably to the judgment stay entered by the Supreme Court of the United States in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858, 73 L. Ed.2d 598, 6 C.B.C. 785, 9 B.C.D. 67 (1982) (hereinafter "Northern"), (stayed until December 24, 1982).

This case involves the exercise of jurisdiction in a foreclosure suit brought under state law to enforce private contractual obligations among litigants, by operation of law residents of the same state (Ohio), and removed to this Court pursuant to jurisdiction vested in the Bankruptcy Courts conformably to 28 U.S.C. §1471, as extended by the stay of the Supreme Court until December 24, 1982.

On 15 December 1982 this Court entered the following order,

> This matter is before the Court upon Motion to Remand filed on 4 October 1982 (along with a supplemental memorandum) by the Winters National Bank & Trust Company of Dayton (hereinafter WNB). The Court considered the Motion at a conference held

on 2 November 1982, at which time the parties agreed that the Court could render decision on the Motion based upon the record without the necessity of further hearing. Debtor subsequently filed a Memorandum in Opposition to the Motion to Remand.

The instant Complaint, filed by WNB in the Montgomery County (Ohio) Common Pleas Court on 21 June 1982 names a number of parties as defendants, including Debtor. The Complaint essentially requests foreclosure on several properties (some of which appear to belong to Debtor) based upon several notes (one of which appears to be an obligation of Debtor).

WNB argues in favor of remand on two grounds: first, lack of jurisdiction in light of the decision by the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 U.S. 2858 (June 28, 1982); and second, "equitable considerations" as elaborated in this Court's opinion in *T. L. C. Inc. v. Ebrights Refrigeration Equipment, Inc.*, 13 B.R. 546, 4 C.B.C. 2d 1543 (1981). Basically, WNB contends that this Court is an inappropriate forum because the instant Complaint raises largely state law questions determinative of the rights of nonbankrupt litigants.

Debtor responds that the portions of the Complaint which have not been settled and are in dispute directly involve or affect Debtor or Debtor's estate. Debtor notes that this matter is closely related to two pending adversary proceedings involving the same parties and properties in the context of creditor requests for relief from the automatic stay of 11 U.S.C. §362. See, Adversarial Proceedings No. 3-82-0421 and No. 3-82-0460.

It is the determination of this Court that it should continue to exercise jurisdiction under 28 U.S.C. §1471, as elaborated and qualified in this Court's opinion in *Benchic v. Century Entertainment Corp.*, Case No. 3-81-04024, Adv. No. 3-81-0242 and 3-81-0516 (December 7, 1982).

It is the further determination of the Court, however, that it would be premature to issue a final resolution of the remand question prior to the Court's determination of the related requests for relief from the automatic stay in Adversarial Proceedings No. 3-82-0421 and No. 3-82-0460, and also prior to the filing of a proposed Plan of Reorganization, as both are necessary to determine the extent of the connection of Debtor's estate, and administration thereof, to the instant Complaint.

IT IS THEREFORE ORDERED that the ultimate resolution of the instant Motion to Remand is RESERVED, until further order of the Court conformably to Interim Bankruptcy Rule of Procedure 7004(j).

The matter is now before the Court upon the following Orders entered on December 21, 1982 by the Judicial Council of the Sixth Circuit and by The United States District Court for the Southern District of Ohio (hereinafter the "Orders") on December 23, 1982, which read as follows:

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
ORDER

Acting pursuant to the authority vested in the Judicial Council by 28 U.S.C. §332(d), the Judicial Council of the Sixth Circuit concludes that the uniform effective and expeditious administration of justice

within this Circuit requires that the attached rule for the administration of the bankruptcy system in this Circuit be adopted by the District Courts of this Circuit pursuant to 11 U.S.C. §105.

It therefore is ordered that each District Court of this Circuit adopt the attached rule to become effective December 25, 1982 if the Congress fails to enact remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. vs. Marathon Pipe Line Co.*, ... U.S. ....., 102 S.Ct. 2858 (1982), and if the Supreme Court fails to extend the stay of its mandate in that case.

For the Council:

[signed]

George Edwards, Chief Judge
Sixth Circuit

Date: December 21, 1982

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

RULE

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court in this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on

its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the Court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy Judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estates; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment

or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge of any notice of appeal of application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States

pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S.Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.*

I

The opinion now expressed herein in summary fashion will be the basic *ratio decidendi* in the innumerable pending cases and adversarial proceedings now pending in this

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*These Orders became effective in this District by Order issued by the Chief Judge of the United States District Court for the Southern District of Ohio. The Order reads as follows:

IN RE: OPERATION OF THE BANKRUPTCY COURT SYSTEM
ORDER

Pursuant to the Order of the Judicial Council of the Sixth Circuit dated December 21, 1982, the United States District Court for the Southern District of Ohio hereby adopts the attached rule for the administration of the bankruptcy system. Such rule will become effective December 25, 1982 if the Congress of the United States fails to enact remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S.Ct. 2858 (1982), and if the Supreme Court fails to extend the stay of its mandate in that case.

IT IS SO ORDERED.

[signed]

CARL B. RUBIN, Chief Judge
United States District Court

Court as guidance to the large number of attorneys whose clients' causes have been posited into a jurisdictional vacuum.

The "Orders" obviously represent a noble and Herculian attempt to provide at least a provisional answer to the plight of litigants involved in Bankruptcy Court cases involving the personal and property rights of Debtors in over 700,000 pending cases nationwide (18,217 cases filed during fiscal year 1982 in this District); and, the personal and property rights of affected parties nationwide reaching into billions of dollars in jeopardy financially, as well as the life blood of thousands of employers and employees, vital to national well being.

Dedicated and professionally capable bankruptcy judges, probably more than any other group, have been aware of the jurisdictional problems which have jeopardized such socio-economic interests for decades (at least since 1965), and long prior to the enactment by the Congress of the Bankruptcy Reform Act of 1978 (hereinafter the "Code") designed to mitigate the inordinate costs and resources wasted because of archaic methods of judicial administration in bankruptcy cases which have historically involved the ". . . broadest spectrum of other laws."*

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*"The present purposes of the Bankruptcy Act are twofold; either to rehabilitate financially a distressed debtor or to assemble and liquidate his assets for distribution to creditors.

In either kind of proceeding, the nature of bankruptcy is to sort out all of the debtor's legal relationships with others, and to apply the principles and rules of the bankruptcy laws to those relationships. Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy. To this end, the Bankruptcy Act incorporates State and general Federal Law in many important areas. The bankruptcy judge must apply to the many diverse and fre-

(Continued on following page)

Since this Code jurisdiction, as found to be unconstitutional, cannot now be exercised in the Bankruptcy Courts it becomes necessary to assist the litigants in reaching a forum to resolve their legal controversies. The Supreme Court provided the Congress with the opportunity to resolve by corrective legislation this constitutional problem either within the Bankruptcy Court structure or by ulterior methods in the federal or state courts. We are constrained to conclude now that the only existing forums available are the state courts, though fully cognizant of the exhaustive research and legislative efforts which lead

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Footnote continued—

quently complex fact patterns that arise in the typical bankruptcy case this general body of law, as well as apply the bankruptcy law:

> 'The variety of legal issues encountered is almost endless. The Bankruptcy Act requires application of the broadest spectrum of other laws governing, for example, taxes, torts, negotiable instruments, contracts, spendthrift and other trusts, mortgages, conveyances, landlord and tenant relationships, partnerships, mining, oil and gas extraction, domestic relations, labor relations, insurance, Securities and Exchange Commission statutes, regulations and decisional law * * *'
>
> [in one recent bankruptcy case, *In re Fotochrome,*] the bankruptcy judge was called upon to decide an international conflict of law question involving sections of the Japanese Civil Code; to construe certain treaties of commerce and navigation, and to give effect to a post-petition award by the International Arbitration Tribunal.

Bankruptcy courts are frequently confronted with constitutional issues. Much of the decisional law surrounding the requirement of the fifth amendment with respect to property rights derives from bankruptcy cases. The courts have also considered issues such as State sovereignty and federalism; first amendment rights; the scope of the contracts clause; the jurisdiction and powers of Federal Courts; the legitimacy of congressional grants of jurisdiction, to name only a few that have arisen. The issues resolved at the trial level in the bankruptcy court system are myriad. With the proposed expansion of jurisdiction granted under H.R. 8200 the scope of issues will surely grow." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 10 (1977); 9 Bkr. L.Ed. §§82:2, p. 18. [citations omitted]

the Congress to confront historic anachronisms in judicial administration in developing the 1978 Bankruptcy Code. This massive effort was exerted in the legislative process for at least a decade of acknowledged dire need.

§22 of the Bankruptcy Act (11 U.S.C. §45) as to referring cases to Referees, §23 (11 U.S.C. §46) as to the jurisdiction of United States and State Courts; §38 (11 U.S.C. §66) as to jurisdiction of Referees; and §39 (11 U.S.C. §67) as to duties of Referees, were all repealed by Pub. L. 95-598, 92 Stat. 2683 §§401, 403, which repealed the Bankruptcy Act *in toto*, excepting certain saving provisions as to cases then pending and the status of United States Bankruptcy Judges then serving. Upon such repeal of the Bankruptcy Act, §§301, 302, 303 and 304 of the Bankruptcy Code superseded the applicable Bankruptcy Rules as adopted by the United States Supreme Court in 1973, to govern references by District Judges and the exercise of jurisdiction by Bankruptcy Judges.

Furthermore, the plurality opinion in *Northern Pipeline* has even placed into question the constitutionality of pre-1978 procedures repealed by the 1978 Code because ". . . those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee [citation omitted], have never been explicitly endorsed by this Court. . . ." 9 B.C.D. at page 81, note 31. The Bankruptcy Court exclusive jurisdiction derived from 28 U.S.C.. § 1471(e) "over property of the debtor" was not, however, explicitly found unconstitutional in *Northern Pipeline*.

The jurisdictional fiction as attempted by the Orders *instanter* under consideration purporting to legislate delegated jurisdiction to the Bankruptcy Courts from the District Courts can rise no higher in effect than the Con-

gressional legislation found unconstitutional. It is noteworthy that 28 U.S.C. §1651(a) and 11 U.S.C. §105 (all Writs Statute) supply jurisdiction to federal courts to issue only ". . . all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." [emphasis added].

All Courts of the United States are courts of limited jurisdiction. The federal district courts have only the powers granted to them by the Congress. Article III, Section 1 of the Constitution creates the Supreme Court of the United States, but delegates to Congress the constitutional power to create all inferior federal courts and thereby to establish their jurisdiction (within, of course, limitations on this power such as the Sixth, Seventh and Eleventh Amendments).

The District Courts have traditionally been the basic Article III courts of first instance in the United States judicial system and have been invested with jurisdiction over federal crimes, admiralty, and bankruptcy, and jurisdiction based upon diversity of citizenship or a "federal question." See 28 U.S.C. §§1331, 1332-34.

The jurisdiction of the District Courts in bankruptcy is now derived from and limited by 28 U.S.C. §1334. Jurisdiction as courts of bankruptcy under §2(a) of the repealed Bankruptcy Act (11 U.S.C. §11) cannot fill the deplorable void now confronting litigants—(because repealed by Public Law 95-598). Although the question of jurisdiction over bankruptcy related litigation conferred upon Bankruptcy Judges as "Article I" judges is virtually impossible to resolve from *Northern Pipeline,* there can be little doubt that no Article III jurisdiction was conferred by 28 U.S.C. §1471 on District Judges. The legislative device of constituting an independent Bankruptcy Court as "adjuncts" of the District Court was found to be un-

constitutional and a "facade" not vesting any real jurisdiction in the District Court. See *Northern Pipeline,* 9 B.C.D. at pp. 78, 84. 28 U.S.C. §1471 very clearly precluded any jurisdictional grant to District Courts as a matter of obvious legislative intent. In so finding, the plurality in *Northern Pipeline* predicated its conclusion on the literal terms of the statute, that all of the jurisdictional reference to the District Courts was automatically and conclusively conferred on the new, independent Bankruptcy Courts.

As previously held by this Court, the Bankruptcy Court as constituted, has no legislated jurisdiction or authorization to transfer to a District Court a proceeding, whether or not the Bankruptcy Court has jurisdiction. *Benchic, et al. v. Century Entertainment Corp., et al.* (*In re Century Entertainment Corp.*) 9 B.C.D. 206, 66 C.B.C. 2d 753, (1977). Even if it is assumed *arguendo* that a District Court might have the usual Federal question jurisdiction, or diversity, or other jurisdiction, transfer is not possible by a Bankruptcy Court that is without jurisdiction. This is more than a venue problem. Conversely, in the absence of legislative authorization, the District Courts cannot confer such jurisdiction either on the Bankruptcy Courts or any other court. Likewise, the Circuit Judicial Council cannot confer jurisdiction on the District Courts as a legislative device.

Even though the Supreme Court has apparently declared 241(a) of the 1978 Bankruptcy Reform Act (Public Law 95-598, November 6, 1978, 92 Stat. 2549 enacting 28 U.S.C. §1471) unconstitutional by the plurality opinion, if it is assumed for the sake of expediency that jurisdiction still lies in Article I Bankruptcy Courts over disputes involving parties who have constructively subjected themselves to bankruptcy court jurisdiction in causes sounding in contract or other state statutory and common law types

of disputes, such jurisdiction is not involved *instanter* because of the very nature of the state foreclosure suit. Hence, even the fiction of District Court jurisdiction does not provide a cause of action the District Court can resolve as a federal question or diversity case. The District Court was vested by the Bankruptcy Code with only appellate functions and then only if the litigants chose not to appeal directly to the Circuit Court of Appeals (or a possible Bankruptcy Judge Appellate Panel to be constituted by the Court of Appeals to avoid the expenses of double-step and triple-step appeals). See 28 U.S.C. Chapter 6,"Bankruptcy Courts" §§151-160, which sections further emphasize the Supreme Court's conclusion that only the Bankruptcy Court was vested with jurisdiction under 28 U.S.C. §1471.

II

There is a more serious aspect, however, from the exercise of fictional jurisdiction by both the Bankruptcy Courts and the District Courts. As between the litigants the judicial process, including appellate court scrutiny of decisions of trial courts, provides a crucible to rationalize the exercise of jursdiction and the deprivation of rights by means which do not bear constitutional muster.

The Bankruptcy Judges and the District Judges should not obviate the very dire possibility of civil liability of judges themselves to the litigants. Despite the general rule that a judge is not civilly liable for acts done in the exercise of the judicial function, the Supreme Court has consistently held that judges of courts of limited jurisdiction (as are all federal courts) are not immune from civil liability where there is no jurisdiction and the lack of jurisdiction over the subject matter is known to the judge. The *Northern Pipeline* decision, no matter how interpreted,

puts Bankruptcy Judges and District Judges on notice that 28 U.S.C. §1471 is unconstitutional. Assuming *arguendo* that there may be judicial immunity, even for acts in excess of jurisdiction in the absence of bad faith or malice, a reading of *Northern Pipeline* may invoke a law suit against a Bankruptcy Judge or District Judge on the basis that there is not even colorable jurisdiction in a particular case. See 46 Am. Jur. 2d, Judges §§72 et seq.; "Supreme Court Views As To Civil Liability of Judges," 55 L. Ed.2d 850.

Before the decision in *Northern Pipeline* judicial immunity was no doubt complete protection until the jurisdiction statute was declared unconstitutional. Now this specter has been raised and litigants might well demand obeisance to the Constitution and the Supreme Court decision.** The very uncertainty of jurisdiction and of civil liability dictates the implementation of the spirit of provisions of 11 U.S.C. §305 which reads, as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -
>
> (1) *the interests of creditors and the debtor would be better served by such dismissal or suspension*; or

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**All of the Supreme Court opinions, those of the plurality, those in dissent, and those concurring, clearly acknowledge and, in effect, emphasize that the creation of federal courts, (whether "Article I" or "Article III" Courts), is a legislative function. Whatever the deficiencies, in any view, existing in the 1978 Bankruptcy Reform Act and 28 U.S.C. §1471, found to be unconstitutional, must be remedied by the Congress as a legislative matter under Article I of the Constitution and not by the Courts under Article III. The separation of powers doctrine, so cherished in our Constitutional form of government, works both directions.

(2) (A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal of suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or *a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise.* [emphasis added].

Weighed against the question of jurisdiction and the possibility, even if remote, of civil liability of a Bankruptcy Judge or District Judge, is the fact that the state Common Pleas Courts have unquestioned general jurisdiction. The potential for interference with the purpose of the Chapter 11 Reorganization by state courts and the desirability and means of conferring federal court jurisdiction in particular bankruptcy cases are legislative matters not judicial, even though hundreds of thousands of individual debtors, business entities, creditors and other affected parties may suffer disastrous consequences.

ORDERED, ADJUDGED AND DECREED that neither the Bankruptcy Courts nor the District Courts are vested with jurisdiction over the litigation of state law causes of action involving nondebtors in a bankruptcy court unless conferred by a jurisdictional statute enacted by the Congress to supplant 28 U.S.C. §1471 or the jurisdiction conferred upon the District Court by other statutes.

ORDERED, that the foreclosure suit filed on June 25, 1982, by the Winters National Bank and Trust Company of Dayton vs. Schear Group, Inc., et al., under Case No. 82-1820, and removed to this Court on July 29, 1982, should

be remanded to the Common Pleas Court of Montgomery County, Ohio, for disposition, as the only court having jurisdiction.

Entered at Dayton, Ohio in said District on the 27 day of December 1982

/s/ ANDERSON
Bankruptcy Judge

APPENDIX I

Constitutional and Statutory Provisions

United States Constitution, Article III, §1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

United States Constitution, Article III, §2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

11 U.S.C. §362:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have commenced before the commencement of the case under this title, or to recover against the debtor that arose before the commencement of the case under this title;

28 U.S.C. §1471(a):

Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 U.S.C. §1471(b):

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

28 U.S.C. §1471(c):

The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

28 U.S.C. §1478:

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

28 U.S.C. §1481:

A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

Pub.L. 95-598, Title IV, §401 (1978):

TITLE IV
TRANSITION

SEC. 401. (a) The Bankruptcy Act is repealed.

(b) Section 3 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved March 3, 1933 (47 Stat. 1482; 11 U.S.C. 101a), is repealed.

(c) Sections 3, 6, and 7 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 923, 924; 11 U.S.C. 76a, 203a, 205a), are repealed.

(d) The sentence beginning "Said section 74" in section 2 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 924; 11 U.S.C. 103a), is repealed.

(e) Subsection (b) of section 4 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 924; 11 U.S.C. 103a), is repealed.

(f) Section 2 of the Act entitled "An Act to amend the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended and supplemented", approved June 5, 1936 (49 Stat. 1476; 11 U.S.C. 93a), is repealed.

(g) Section 3 of the Act entitled "An Act to amend the Interstate Commerce Act, as amended, and for other purposes", approved April 9, 1948 (62 Stat. 167; 11 U.S.C. 208), is repealed.

Pub.L. 95-598, Title IV, §404(a) (1978):

The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the Amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

Pub.L. 95-598, Title IV, §405(1978):

(a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except -

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt -

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy court established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be -

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the court of appeals,

and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

(d) The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.